TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No [redacted] 107

GERTRUDE CRANE, AS ADMINISTRATRIX, &c., OF GEORGE W. SAUER, DECEASED, PLAINTIFF IN ERROR,

vs.

LOUIS H. HAHLO, GEORGE P. NICHOLSON, AND JACOB A. CANTOR, AS AND CONSTITUTING THE BOARD OF REVISION OF ASSESSMENTS OF THE CITY OF NEW YORK, ET AL.

IN ERROR TO THE SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, OF THE STATE OF NEW YORK.

FILED JULY 15, 1920.

(27,807)

(27,807)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 450.

GERTRUDE CRANE, AS ADMINISTRATRIX, &c., OF GEORGE W. SAUER, DECEASED, PLAINTIFF IN ERROR,

vs.

LOUIS H. HAHLO, GEORGE P. NICHOLSON, AND JACOB A. CANTOR, AS AND CONSTITUTING THE BOARD OF REVISION OF ASSESSMENTS OF THE CITY OF NEW YORK, ET AL.

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INDEX.

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a (Clerk's Index No. 2608, Year 1919.)

[Reg. 126, Fol. 41.]

In the Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Gertrude Crane, as Administratrix of the Goods, Chattels, and Credits Which Were of George W. Sauer, Deceased, Relator-Respondent,

against

LOUIS H. HAHLO, GEORGE P. NICHOLSON and JACOB A. CANTOR, as and Constituting the Board of Revision of Assessments of the City of New York, and William C. Ormond, Andrew T. Sullivan, and Maurice Simmons, as and Constituting the Board of Assessors of the City of New York, and The City of New York, Defendants-Appellants.

On Appeal from the New York Supreme Court, Appellate Division, First Department.

PAPERS ON APPEAL.

John M. Harrington, Attorney for Relator-Respondent, No. 16 Exchange Place, Borough of Manhattan, New York City.

William P. Burr, Corporation Counsel, Attorney for Defendants-Appellants, Municipal Building, Borough of Manhattan, New York City.

1 New York Supreme Court, County of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Gertrude Crane, as Administratrix of the Goods, Chattels, and Credits Which Were of George W. Sauer, Deceased, Relator-Respondent,

against

LOUIS H. HAHLO, GEORGE P. NICHOLSON and JACOB A. CANTOR, as and Constituting the Board of Revision of Assessments of the City of New York, and William C. Ormond, Andrew T. Sullivan, and Maurice Simmons, as and Constituting the Board of Assessors of the City of New York, and The City of New York, Defendants-Appellants.

Notice of Appeal to the Appellate Division.

SIRS:

Please take notice that the defendants in the above entitled proceeding hereby appeal to the Appellate Division of the New York

Supreme Court, in and for the First Department, from the order herein dated and entered in the office of the Clerk of the County of New York on or about the 9th day of August, 1919, denying
2 defendant's motion to dismiss the writ of certiorari herein, and the said defendants appeal from each and every part of said order as well as from the whole thereof.

Dated New York, August 19, 1919.

Yours, etc.,

WILLIAM P. BURR,
Corporation Counsel,
Attorney for Defendants-Appellants.

Office and Post Office Address: Municipal Building, Borough of Manhattan, New York City.

To John M. Harrington, Esq., Attorney for Relator-Respondent, No. 16 Exchange Place, Borough of Manhattan, New York City; William F. Schneider, Esq., County Clerk, New York County.

3 *Order Appealed From.*

At a Special Term, Part I. of the Supreme Court of the State of New York, Held in and for the County of New York, at the County Court House, in Said County, on the 9th Day of August, 1919.

Present—Hon. Robert L. Luce, Justice.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Gertrude Crane, as Administratrix of the Goods, Chattels, and Credits Which Were of George W. Sauer, Deceased, Relator,

against

LOUIS H. HAHLO, GEORGE P. NICHOLSON, and JACOB A. CANTOR, as and Constituting the Board of Revision of Assessments of The City of New York, and William C. Ormond, Andrew T. Sullivan, and Maurice Simmons, as and Constituting the Board of Assessors of The City of New York, and The City of New York, Defendants.

Order.

The defendant The City of New York having moved to dismiss the writ of certiorari in the above entitled proceeding allowed by this Court on January 28, 1919, and said motion having come on duly to be heard on July 22, 1919, now, on reading the notice of
4 motion herein bearing date of July 16, 1919, and proof of service thereof heretofore filed and on reading said writ of certiorari filed in the office of the Clerk of New York County on February 1, 1919, the order allowing said writ filed and entered in said Clerk's office on January 28, 1919, and the affidavits of John M. Harrington and Gertrude Sprotte, each verified January 27, 1919, and Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9 annexed to said affidavits

and filed with said order, after hearing Mr. Charles J. Nehrbas, assistant corporation counsel of the defendant The City of New York, in support of said motion, and Mr. John M. Harrington, of counsel for relator, in opposition thereto, due deliberation having been had, and on filing the opinion of the Court herein, it is

On motion of John M. Harrington, attorney for the relator,

Ordered that said motion be and the same hereby is, in all respects, denied, with $10.00 costs.

Enter,

R. L. L.,
J. S. C.

5 *Notice of Motion—Read in Behalf of Defendant.*

Supreme Court, New York County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Gertrude Crane, as Administratrix of the Goods, Chattels, and Credits Which Were of George W. Sauer, Deceased, Relator,

against

LOUIS H. HAHLO, GEORGE P. NICHOLSON, and JACOB A. CANTOR, as and Constituting the Board of Revision of Assessments of The City of New York, and William C. Ormond, Andrew T. Sullivan, and Maurice Simmons, as and Constituting the Board of Assessors of The City of New York, and The City of New York, Defendants.

SIR:

Please take notice that upon the writ of certiorari herein allowed by this Court on January 28, 1919, the order allowing said writ, duly entered in the office of the Clerk of the County of New York on January 28, 1919, and all the papers upon which said order was based and upon the order duly entered herein in the office of the Clerk of the County of New York on April 10, 1919, bringing in the City of New York as party defendant, the undersigned
6 will move this Court at a Special Term, Part I thereof, to be held in and for the County of New York, at the County Court House in the Borough of Manhattan, City of New York, on the 22d day of July, 1919, at 10:15 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the writ of certiorari herein upon the ground that a writ of certiorari will not lie to review the determinations sought to be reviewed.

Dated New York, July 16, 1919.

Yours, etc.,

WILLIAM P. BURR,
Corporation Counsel, Attorney for Defendant,
The City of New York.

Office and Post Office Address, Municipal Building, Borough of Manhattan, City of New York.

To John M. Harrington, Esq., Attorney for Relator, 16 Exchange Place, Borough of Manhattan, City of New York.

7 *Writ of Certiorari—Read in Behalf of Defendants.*

New York Supreme Court, New York County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Gertrude Crane, as Administratrix of the Goods, Chattels, and Credits Which Were of George W. Sauer, Deceased, Relator.

against

LOUIS H. HAHLO, GEORGE P. NICHOLSON, and JACOB A. CANTOR, as and Constituting the Board of Revision of Assessments of The City of New York, and William C. Ormond, Andrew T. Sullivan, and Maurice Simmons, as and Constituting the Board of Assessors of The City of New York.

Writ of Certiorari.

The People of the State of New York to Louis H. Hahlo, George P. Nicholson and Jacob A. Cantor, as and constituting the Board of Revision of Assessments of the City of New York, and William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and constituting the Board of Assessors of the City of New York, Greeting:

Whereas, we have been informed by the affidavits of John M. Harrington and Gertrude Sprotte, each verified January 27, 1919, and Exhibits 1 to 9, inclusive, annexed thereto, that respective hearings have heretofore been had before you, as and constituting,
8 respectively, the Board of Assessors of the City of New York and the Board of Revision of Assessments of the City of New York, under certain statutes of the State of New York in respect of a certain claim for damages heretofore filed, in behalf of the above named relator, with said Board of Assessors, in conformity with the provisions of Section 873, Chap. 410, Laws of 1882, and within the period prescribed by Section 951 of the Greater New York Charter, as amended by Laws 1916, Chap. 516, that the relator appeared before you on said hearing by her counsel in the premises and adduced evidence and made oral arguments in support of said claim for damages; that the corporation counsel of the City of New York appeared before you in opposition to said claim, that on or about October 1, 1918, such of you as constitute said Board of Assessors, made an award of damages, in the principal sum of only $42,500, to the above named applicant as administratrix of the estate of George W. Sauer, deceased, sustained, in respect of certain real property, by reason of the erection of the 155th Street viaduct; that the relator herein duly filed with such of you as constitute said Board of Assessors objections in respect of such proposed award, in said principal sum of $42,500, that no objections to said award in the last named amount was ever

filed or urged in behalf of The City of New York, that on October 2, 1918, such of you as constitute said Board of Revision of Assessments confirmed said award that had been thus made by said Board of Assessors; that the relator claims that certain provisions of Chap. 516 of the Laws of 1916, and of Chap. 619 of the Laws of 1918, assuming to declare that the determination of said Board of Revision, or the confirmation by such last named board of an award made by said Board of Assessors, shall be final and conclusive is, as against the relator's right to a review of such award pursuant to a writ of certiorari, null and void and in violation of the following respective constitutional provisions, namely, Section 6 of Article I of the Constitution of the State of New York, Section 10 of Article I, of the Constitution of the United States and Section 1 of the evidence and in violation of the relator's rights in the premises, as more fully set forth in said affidavit of John M. Harrington, that your said respective decisions and determinations were and are erroneous, unwarranted, arbitrary, illegal, contrary to law, in disregard of the evidence and in violation of the relator' rights in the premises, as more fully set forth in said affidavit of John M. Harrington and as appears from said exhibits annexed thereto, that injustice has been done to said relator in that she as administratrix as aforesaid has been deprived of the right to recover the full amount of the loss and damage sustained by her intestate, in respect of the real property referred to in said affidavit of said John M. Harrington, by reason of the erection of the 155th Street viaduct in front of said premises, in violation of the law and the statutes of the State of New York, that the illegality of your respective determinations appears from the allegations of said last named affidavit and from said exhibits annexed thereto and that said relator, prays, among other things, that a writ of certiorari be issued out of and allowed by this Court commanding and directing you as and constituting, respectively, the Board of Revision of Assessments of the City of New York and the Board of Assessors of the City of New York to certify and to return to this Court the record and proceedings had in the premises before said respective boards, to the end that said decisions and determinations may be reviewed, reversed and wholly annulled, and to the further end that you as and constituting said respective boards may be directed to make to the relator herein an additional award for the loss of damage sustained in the premises and to confirm the same, as required by the statutes in such cases made and provided, and that the relator may have such other and further relief in the premises as may be just and proper; we being willing to be certified of your proceedings as and constituting said respective boards in making said determinations resulting in said award, in the principal sum of only $42,500, do command you that, within twenty (20) days after the service of this writ upon you, you do certify and return to us, at the office of the Clerk of the County of New York, New York, all and singular your records and proceedings resulting in your said respective determinations whereby an award to the relator, in the principal sum of only $42,500, was made by such of you as constitute the Board of Assessors and confirmed by such of you as constitute said Board of Revision of Assessments, to

the end that the said determinations and each of them may be reviewed and corrected by this Court, upon the merits, according to law, and so that said claim for damages may be remitted to said Board of Assessors or to said Board of Revision, or to both of said boards, with a direction to make to the relator a further award in the premises that will represent the full amount of the loss and damage sustained by the relator's intestate in respect of the real property hereinabove referred to by reason of the erection of the 155th Street viaduct, and so that our Supreme Court may further cause to be done in the premises what of right and according to law ought to be done; and have you then and there this writ.

11 Witness, the Hon. Edward R. Finch, one of the Justices of the Supreme Court of the State of New York, at the County Court House, in the County of New York, New York, on the 28th day of January, 1919.

By the Court,

[SEAL.] WM. F. SCHNEIDER,
Clerk.

JOHN M. HARRINGTON,
Attorney for Relator.

Office and Post Office Address, 16 Exchange Place, Borough of Manhattan, New York City, New York.

Endorsed: The within writ of certiorari is hereby allowed this 28th day of January, 1919.

EDWARD R. FINCH,
Justice of the Supreme Court
of the State of New York

12 *Order Allowing Writ of Certiorari—Read on Behalf of Defendant.*

At a Special Term, Part II. of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House in said County, on the 28th day of January, 1919.

Present—Hon. Edward R. Finch, Justice.

In the Matter of the Application of GERTRUDE CRANE, as Administratrix of the Goods, Chattels and Credits which were of George W. Sauer, deceased, for a writ of certiorari to be directed to Louis H. Hahlo, George P. Nicholson and Jacob A. Cantor, as and constituting the Board of Revision of Assessments of the City of New York, and William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and constituting the Board of Assessors of the City of New York.

Order Allowing Writ of Certiorari.

On reading and filing the annexed affidavits of John M. Harrington and Gertrude Sprotte, each verified January 27, 1919, and Ex-

hibits 1, 2, 3, 4, 5, 6, 7, 8 and 9, annexed thereto, and on motion of John M. Harrington, attorney for the above named applicant, it is hereby

Ordered that a writ of certiorari, as prayed for in said affidavit of John M. Harrington, be issued out of and under the seal of this Court directed to Louis H. Hahlo, George P. Nicholson and
13 Jacob A. Cantor, as and constituting the Board of Revision of Assessments of the City of New York, and William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and constituting the Board of Assessors of the City of New York; it is hereby

Further ordered that the said writ of certiorari be returnable within twenty (20) days after the service thereof, at the office of the Clerk of New York County, at the County Court House, in said New York County and that said writ be allowed, signed and sealed by the Clerk of this Court in and for the County of New York; and it is hereby

Further ordered that the Court hereby, in its discretion, dispenses with notice of the application for the said writ hereby ordered.

Enter,

E. R. F.,
J. S. C.

14 *Affidavit of John M. Harrington—Read on Behalf of Defendant.*

New York Supreme Court, New York County.

In the Matter of the Application of GERTRUDE CRANE, as Administratrix of the Goods, Chattels and Credits which were of George W. Sauer, deceased, for a writ of certiorari to be directed to Louis H. Hahlo, George P. Nicholson and Jacob A. Cantor, as and constituting the Board of Revision of Assessments of the City of New York, and William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and constituting the Board of Assessors of the City of New York.

Affidavit.

STATE OF NEW YORK,
County of New York, ss:

John M. Harrington, being duly sworn, deposes and says:

1. The deponent is an attorney and counsellor at law, is the attorney for the applicant in the above entitled proceeding and was the attorney for said applicant before the Board of Assessors of the City of New York and before the Board of Revision of Assessments of the City of New York, in respect of the claim for damages hereinafter mentioned; and, either personally or through information gained from the examination of records and through the performance
15 of the deponent's duties as attorney for the above named applicant in respect of the proceedings hereinafter referred to, deponent is familiar with the facts and proceedings hereinafter mentioned.

2. On June 30, 1916, there was filed with the Board of Assessors of the City of New York, in behalf of the above named applicant, a claim for damages sustained in respect of certain premises therein described by reason of the change of grade of 155th Street by the erection of the 155th Street viaduct from St. Nicholas Place to McCombs Dam Bridge, in the City, County and State of New York.

3. As deponent is informed and verily believes, the land and buildings referred to in said claim for damages were owned by the claimant's intestate, George W. Sauer, at the time of the erection of said 155th Street viaduct and the applicant's said intestate suffered loss and damage in respect of said land and buildings by reason of the erection of said viaduct.

4. On December 8, 1916, a majority of the Board of Assessors of the City of New York dismissed the claim for damages filed as aforesaid, on the ground that said board had no jurisdiction to entertain it.

5. Thereafter in a certiorari proceeding instituted to review the determination of said board in dismissing said claim for damages, this Court made an order bearing date May 18, 1917, and filed in the office of the Clerk of the Appellate Division of the Supreme Court, First Department, on May 22, 1917, a certified copy of which order was filed in the office of the Clerk of the County of New York on May 23, 1917, whereby said claim for damages was remitted to the Board of Assessors of the City of New York and whereby
16 said board was "directed to hear and determine the said claim upon the merits according to law," a copy of which order, marked Exhibit 1, is hereto annexed and made part hereof as if here set forth at length.

6. An appeal from said order of this Court bearing date May 18, 1917, was taken by the City of New York to the Court of Appeals, pursuant to an order of this Court allowing the same and certifying certain questions to the Court of Appeals; and the deponent, as the relator's counsel upon the oral argument of said appeal, directed the attention of the Court of Appeals to the provisions of Laws of 1916, Chapter 516, to the effect that the determination of the Board of Revision should be final and conclusive upon all persons interested in all awards made by the Board of Assessors and respectfully suggested to the Court of Appeals that some intimation be given upon the question of damages.

7. The relator's brief submitted to the Court of Appeals in the last mentioned clause contains, at p. 24 thereof, the following words:

"What difference can it make that the support of 155th Street on its upper level, namely, of the viaduct, consists, not of a solid masonry wall, but of iron columns placed at intervals in front of the relator's premises. * * * The nature of the damage would be the same in each case, though the extent thereof might be different."

Upon the determination of said appeal, the Court of Appeals handed down a unanimous opinion, in which it was said, among other things, as follows:

"The serious question in the case is whether the structure
17 in One hundred and fifty-fifth Street changed the grade of the street within the meaning of the acts of 1882 and 1916. Wholly independent of the authorities upon the subject we are of the opinion that it did. It is true that the original surface of the street was not altered except by the erection of pillars. It is true that pedestrians and vehicles may still pass over it. But practically and substantially One hundred and fifty-fifth Street as now used passes on a level fifty feet or more above the Sauer property. This is the level adopted by travel east and west. To the street so used access was denied to Mr. Sauer. Necessarily his damage was great."

See People ex rel. Crane vs. Ormond, 221 N. Y., 283, at page 287.

8. The Court of Appeals having answered the questions thus certified to it and having sent down its remittitur in said cause, this Court made an order therein bearing date July 23, 1917, and filed and entered in the office of the Clerk of the Appellate Division, First Department, on July 23, 1917, a certified copy of which order was filed in the office of the Clerk of the County of New York on July 25, 1917, whereby this Court ordered and adjudged, among other things, that said judgment of the Court of Appeals be made the judgment of this Court and that said order of this Court bearing date May 18, 1917, be affirmed.

9. On September 17, 1917, the trial of the applicant's said claim was commenced before the Board of Assessors as then constituted, the above named William C. Ormond, being then president; and at that hearing, among other evidence adduced, a certified copy of this
Court's order bearing date May 18, 1917, of which Exhibit 1
18 is a copy, and a certified copy of this Court's order bearing date July 23, 1917, were received in evidence before said board and certain witnesses were examined and certain other evidence adduced in support of the applicant's said claim for damages.

10. Further evidence in support of said claim for damages was adduced before said Board of Assessors on September 24, 1917; and deponent, as applicant's counsel, then stated in effect that, with the exception of furnishing proof as to certain collateral matters, the evidence on behalf of the applicant was complete. The assistant corporation counsel in charge being then unable or unwilling to state when evidence in behalf of the City would be adduced, the board "adjourned on call."

11. At a meeting before the board on November 21, 1917, the assistant corporation counsel stated that the City was not ready to proceed and announced that the City had engaged one real estate

expert witness, Pierre G. Carroll, as far back as August, 1917, and further stated as follows:

"Besides which we feel that in a case of this importance in which the damages claimed exceed that of any claim that has been before the Board since the Mott case, that we are not justified in relying upon the opinion of one witness. Now we need, certainly, one other real estate witness and a builder, if we can get a man who has seen the building and been in it."

12. Deponent repeatedly endeavored to have the City proceed with the trial of the claim before said Board and in that regard had an interview with and wrote former corporation counsel, Lamar Hardy, Esq., had numerous interviews with the assistant corporation counsel in charge, and since January 1, 1918, had several interviews 19 with the present corporation counsel, William P. Burr, Esq., in all of which deponent urged that the trial of the claim be completed.

13. As deponent is informed and believes, the City of New York, through its corporation counsel, employed three real estate appraisers to testify in behalf of the City upon the trial of said claim for damages, namely, Pierre G. Carroll, Henry C. Authenreith and one McMonegal.

14. On January 10, 1918, Andrew T. Sullivan and Maurice Simmons having been duly appointed members of the Board of Assessors in the place of Jacob J. Lesser and St. George B. Tucker, it was stipulated on the record before said Board to the effect that all proceedings theretofore had before the Board of Assessors should be read and considered by the Board of Assessors as then constituted, with the same force and effect as if adduced anew; and upon the last named date deponent as applicant's counsel renewed a motion, which had been made on November 21, 1917, before the Board of Assessors as then constituted, that the Board set a date upon which the City should adduce its evidence, that, in default of the City's proceeding on the date so fixed, the hearing should be closed and that the Board should then proceed to determine the cause on the evidence already adduced, but that motion was denied as had been the former motion made on November 21, 1917.

15. On said January 10, 1918, at room 809, in the Municipal Building, in the Borough of Manhattan, New York City, N. Y., deponent served upon each of said members of the Board of Assessors, namely, said William C. Ormond, Andrew T. Sullivan and Maurice Simmons, personally, a duly certified copy of this 20 Court's order bearing date May 18, 1917, of which said Exhibit 1 is a copy, by delivering to each of them, personally, a certified copy of said order and leaving the same with each of them, and deponent knew the persons so served to be the above named members now constituting said Board of Assessors; and at the same time deponent delivered to and left with each of them, personally,

a typewritten copy of the opinion of the Court of Appeals that is reported in 221 N. Y., 283, et seq.

16. As deponent is informed and verily believes, the municipal authorities of the City, with the active co-operation of said Ormond, caused to be drafted and, on March 21, 1918, to be introduced into the assembly of the State of New York the bill that subsequently and on May 11, 1918, became Laws 1918, Chapter 619, whereby several sections of the Greater New York Charter, including sections 944, 950 and 951 thereof, were amended; and said Section 944, as so amended, prescribes, among other things, as follows:

"The confirmation of any such award by the Board of Revision of Assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained."

17. On June 5, 1918, pursuant to request, Frank G. Swartwout, a witness that had testified on September 24, 1917, as a real estate expert in behalf of the applicant, was produced before the Board of Assessors for further cross-examination, and was further cross-examined by the assistant corporation counsel in charge; and, on the same day, one Henry G. Authenrieth was called as an expert witness in behalf of the City and was thereupon examined and cross-examined.

21 18. At the conclusion of the hearing upon the last named day the assistant corporation counsel in charge requested an adjournment for the purpose of producing further expert testimony on behalf of the City and the Board fixed June 12, 1918, as the date for the next hearing.

19. On said June 12, said assistant corporation counsel in charge appeared before said board and without producing any further evidence, announced that the City rested. On the same day, the hearing having been closed, an oral argument was had before said board, said Ormond and said Simmons being present; and, on the next day, deponent caused three copies of said applicant's brief to be delivered at the office of said Board of Assessors and, as deponent is informed and verily believes, the City's brief was submitted to said Board on or about June 18, 1918.

20. In addition to oral testimony given upon the trial of said claim for damages before the Board of Assessors excerpts from the testimony of the late George W. Sauer (the applicant's intestate) and of his daughter Amelia Dobbs (now deceased) and of several other witnesses which had been taken at a trial term of this Court before the late Mr. Justice David McAdam upon the trial of an action that had been brought by said George W. Sauer against the Mayor, Aldermen and Commonalty of the City of New York (which was subsequently reported as Sauer vs. The Mayor, 44 App. Div., 305), were pursuant to stipulation between the corporation counsel and the applicant's counsel, read in evidence, some parts in behalf of the applicant and some in behalf of The City of New York.

21. Upon the trial before the said Board of Assessors evidence was adduced to establish that the property owned by said George
22 W. Sauer during the erection of said viaduct is situated on the southwest corner of 155th Street and 8th Avenue in the City, County and State of New York, consisted of five lots, two with a frontage of 49′ 11″ on 8th Avenue and a frontage of 100 feet on 155th Street and three adjoining lots with 75 feet frontage on 155th Street by a depth of 99′ 11″; that those five lots were purchased by John Gerken in 1881 and 1882, that said Gerken caused to be erected thereon during the last named two years three frame buildings covering practically the entire land, that those buildings were used together as a place of public resort, recreation and entertainment and were generally known as the "Atalanta Casino," that the building on the corner lot fronting on 8th Avenue cost about $10,000, that the Casino Building on the three westerly lots fronting on 155th Street and the building on the southerly 8th Avenue lot cost about $25,000, that the cost to Mr. Gerken for installing a steam heating plant, gas fixtures and bowling alleys and of painting was $10,000 or $12,000; that said John Gerken conveyed said lands and buildings to the applicant's intestate George W. Sauer by deed bearing date July 1, 1886, in consideration of the sum of $80,000, that thereafter the applicant's said intestate made additional improvements (including a roof garden over the two Eighth Avenue buildings) costing in the aggregate about $18,000, that said George W. Sauer kept said buildings in good repair and had the same repainted when required and that said George W. Sauer paid assessments that had been levied upon said premises in 1887 for grading 155th Street and assessments that had been levied thereon in 1889 for installing a sewer in said street, amounting in the aggregate to about $2,143.63.

23 22. As a deponent is informed by the accompanying affidavit of Gertrude Sprotte upon the trial before said Board of Assessors said John Gerken, a witness called in behalf of the applicant, testified in respect of said premises generally known as the "Atalanta Casino," among other things (as shown by the stenographer's minutes of the proceedings before said Board of Assessors) as is set forth in the paper hereto annexed, marked Exhibit 2, and made part hereof, as if here repeated at length.

23. As deponent is informed by said affidavit of Gertrude Sprotte, upon the trial before said Board of Assessors, Gertrude Crane, a witness called on her own behalf, testified that she was a daughter of the late George W. Sauer, and that her said father was in undisputed possession of the property referred to in the claim for damages from 1886 to 1900 and, among other things, testified (as shown by the stenographer's minutes of the proceedings before said Board of Assessors) as is set forth in the papers hereto annexed, marked Exhibit 3, and make part hereof, as if here repeated at length.

24. As deponent is informed by said affidavit of Gertrude Sprotte, upon the trial of said claim for damages before said Board of As-

sessors certain testimony that had been given by the late Amelia Dobbs (a daughter of the late George W. Sauer) upon the trial of said cause known as Sauer vs. The Mayor, was pursuant to stipulation used in evidence in behalf of the applicant; and the testimony used in evidence is, in part, as set forth in the paper hereto annexed and marked Exhibit 4, and made part hereof as if here repeated in length.

25. As deponent is informed by the affidavit of Gertrude
24 Sprotte, upon the trial of said claim for damages before said Board of Assessors certain testimony that had been given by the late George W. Sauer upon the trial of said cause generally known as Sauer vs. The Mayor, was pursuant to stipulation used in evidence in behalf of the applicant; and the testimony so used is, in part, as set forth in the paper hereto annexed and marked Exhibit 5, and made part hereof, as if here repeated at length.

26. As deponent is informed by said affidavit of Gertrude Sprotte, annexed hereto marked Exhibit 5 and made part hereof, as if here repeated at length, is a copy of the stenographer's minutes of all of the testimony of Frank G. Swartwout given, both on his direct and cross-examinations, before said Board of Assessors upon the trial of the applicant's said claim for damages. Said Frank G. Swartwout was the only expert witness examined in behalf of the claimant before said Board of Assessors upon the trial of said claim. As deponent is informed and verily believes, the facts assumed in the hypothetical question, comprising approximately ten typewritten pages of said stenographer's minutes and also contained in said Exhibit 6, are supported by the evidence adduced before said Board of Assessors upon the trial of said claim for damages.

27. As deponent is informed by the affidavit of Gertrude Sprotte, annexed hereto marked Exhibit 7 and made part hereof, as if here repeated at length, is a copy of the stenographer's minutes of all of the testimony of Henry G. Authenrieth given before said Board of Assessors upon the trial of the applicant's claim for damages. Said Henry G. Authenrieth was the only expert witness examined in behalf of The City of New York before said Board of Assessors upon the trial of said claim for damages.

25 28. On or about June 21, 1918, said Board of Assessors consisting of said Ormond, said Sullivan and said Simmons, determined to award to the applicant herein as administratrix, the sum of only $40,000, as the principal amount of the damages sustained in respect of the premises referred to in said claim for damages by reason of the erection of said viaduct and signed a report or certificate specifying said $40,000 as representing the principal amount of the damage sustained in the premises and thereafter advertised, pursuant to Section 950 of the Greater New York Charter, a notice to the effect that all persons opposed to such proposed award should present their objections in writing on or before July 25, 1918.

29. On or about July 3, 1918, the applicant as administratrix as aforesaid obtained an order to show cause from one of the justices of

this court directing said Ormond, said Sullivan and said Simmons to show cause at a term of the Appellate Division, First Department, why they and each of them should not be punished for a contempt of court because of their misconduct and offenses in failing to obey the mandate of this Court evidenced by this Court's order bearing date May 18, 1917 (of which said Exhibit 1, hereto annexed, is a copy). Said order to show cause was returnable before this Court on July 9, 1918. In opposition to said application to punish said members of said Board of Assessors for a contempt of Court, said Ormond submitted an affidavit verified July 8, 1918, wherein among other things, he said:

"With respect to the particulars set forth in subdivision 'c' of said order to show cause, it is true that the Board of Assessors determined the claim upon the assumption that from an upper story of
26 any building constructed upon the premises a ramp or bridge could be built over the intervening space so as to connect such buildings with said viaduct."

Said Sullivan and said Simmons also submitted affidavits in opposition to said application to punish them for a contempt of Court, each of which affidavits was verified July 8, 1918, wherein each said:

"I have read the affidavit of William C. Ormond in this proceeding and know the contents thereof. The facts concerning the determination of the claim of the applicant herein are correctly set forth in said affidavit and I concur in all the statements therein contained."

30. On July 12, 1918, the Court denied the application to punish said Ormond, Sullivan and Simmons for a contempt of Court, with costs.

31. On July 16, 1918, objections, in behalf of the applicant herein as administratrix as aforesaid, were duly filed with said Board of Assessors to the proposed award in the principal sum of only $40,000, and on July 25, 1918, deponent as counsel for the applicant appeared before said Board of Assessors and made an oral argument in support of said objections. During the course of that oral argument said William C. Ormond expressly stated in effect that said award (in the principal sum of $40,000) included nothing whatever to represent the damages sustained because of the "diversion of traffic" and also made a statement to the effect that, in his opinion, the construction of the 155th Street viaduct had diverted travel from the lower level of 155th Street to the viaduct level to the extent of 98%; and neither of the other members of the Board dissented from the statements thus made.

27 During the course of said hearing before said Board of Assessors held on July 25, 1918, said Ormond made a statement to the effect that it has been his uniform understanding that where any structure had been erected in a street such as the 155th Street viaduct the abutting owners have an absolute right to connect with it, and whenever the question has arisen the Board of Estimate has granted a consent; and no evidence to support said

statement was adduced before said Board upon the trial of said claim for damages.

32. After hearing said objections said Board of Assessors did not alter said award made to the applicant as administratrix as aforesaid, but, pursuant to Section 950 of the Greater New York Charter, presented such objections, with such proposed award, to the Board of Revision of Assessments of the City of New York.

33. No objection to the award thus made by the Board of Assessors to the applicant as administratrix as aforesaid was filed or urged in behalf of the City of New York.

34. On July 30 and 31 and August 1, 1918, the Board of Revision of Assessments of the City of New York, consisting of the above named Louis H. Hahlo, deputy and acting comptroller of the City of New York, George F. Nicholson, assistant and acting corporation counsel of the City of New York, and Jacob A. Cantor, president of the Board of Taxes and Assessments of the City of New York, gave a hearing in respect of said objections to said award of damages made to the applicant as administratrix as aforesaid and heard the deponent as counsel for said applicant in support of her objections to said award; and thereafter and on or about August 10, 1918, said Hahlo, said Nicholson and said Cantor, as and constituting said Board of Revision, referred said award back to said Board of Assessors with instructions to increase the same from $40,000 to $42,500.

35. Thereafter and on or about August 31, 1918, said Board of Assessors made a new proposed award to the applicant as administratrix as aforesaid in the principal sum of $42,500, signed a certificate of award not then dated, a copy of which certificate (except as to date) is, as deponent is informed by said affidavit of Gertrude Sprotte, hereto annexed, marked Exhibit 8 and made part hereof as if here repeated at length; and thereafter said Board of Assessors caused to be published a notice to the effect that objections thereto should be filed on or before October 1, 1918, and that such objections would then be heard.

36. On September 17, 1918 written objections bearing date September 16, 1918, to said award in the principal sum of $42,500, were filed in behalf of the applicant as administratrix as aforesaid and a copy of said objections is hereto annexed, marked Exhibit 9 and made part hereof as if here repeated at length. On October 1, 1918, deponent, as applicant's counsel, appeared before said Board of Assessors, consisting of said Ormond, said Sullivan and said Simmons, in support of the objections thus filed and said Board did not alter the award thus made to the applicant herein, but presented such objections, with such proposed award (after dating the certificate of such award October 1, 1918) to the Board of Revision and Assessments.

No objections to the proposed award in the principal sum of $42,500, thus made by the Board of Assessors to the applicant as ad-

ministratrix as aforesaid, were ever filed or urged in behalf of the City of New York.

29 37. On October 2, 1918, deponent, as applicant's counsel, attended before said Board of Revision of Assessments of the City of New York, consisting of said Hahlo, said Nicholson and said Cantor, and again insisted upon the applicant's said objections to the last mentioned award in the principal sum of $42,500. Thereupon, on motion of the assistant and acting corporation counsel, said objections were overruled and the certificate of wards was confirmed, all of said members of said Board of Revision voting in the affirmative.

38. On information and belief, said award, in the principal sum of only $42,500 thus made by said Board of Assessors and thus confirmed by said Board of Revision, does not include the amount of the depreciation in the market value of the premises referred to in said claim for damages that resulted from the fact that, since the erection of said viaduct, practically and substantially 155th Street as used passes on a level fifty feet or more above the premises referred to in said claim for damages.

39. On information and belief, said last mentioned award thus made and thus confirmed, does not include the amount of the depreciation in the market value of the premises referred to in said claim for damages that resulted from the fact that upon the erection of said viaduct the viaduct level (instead of the lower level of 155th Street) became the level adopted by travel east and west.

40. On information and belief, said last mentioned award does not include the depreciation in the market value of said premises that resulted by reason of the fact that the erection of said viaduct caused travel or traffic to be diverted from the lower level of 155th Street in front of said premises, to the viaduct level thereof.

30 41. On information and belief, said last mentioned award does not include the amount of the depreciation in the market value of said premises that resulted from the fact that access from said premises to said viaduct was denied to the applicant's intestate.

42. On information and belief, said last mentioned award was fixed and determined upon the erroneous assumption that from an upper story of any building that might be constructed upon said premises a ramp or bridge might be built over the intervening space between such building and said viaduct so as to connect such building with said viaduct and that said Board of Assessors based their determination in that behalf in part upon alleged facts of which no evidence was adduced before them upon the trial of said claim.

43. As deponent is advised and verily believes, said determinations of said Board of Assessors and of said Board of Revision hereinabove described, resulting in said award to the applicant of the principal sum of only $42,500 and each of said determinations were and are erroneous, arbitrary, in disregard of the evidence and contrary to

law, the amount of such award, thus allowed and thus confirmed, does not represent the full amount of the loss and damage sustained by the applicant's intestate in the premises as required by Section 873 of the New York City Consolidation Act (Laws 1882, Chap. 410), and said determinations and each of them were arbitrary and illegal and operate to the injury of the applicant's rights in the premises, as will be more fully seen from an examination of the exhibits hereto annexed.

44. Before the comptroller of the City of New York was ready to deliver to the applicant as administratrix as aforesaid a city
31 warrant in the sum of $106,250, being the principal of the award of $42,500 and interest thereon as computed by the Board of Assessors to October 1, 1918, deponent endeavored to make an agreement between said applicant and the City of New York to the effect that the acceptance by the above named applicant as administratrix as aforesaid of said sum of $106,250, and the giving of a receipt therefor should in no way prejudice any right that she as administratrix as aforesaid or her successor might have to a review in the courts of the respective determinations of said Board of Assessors and of said Board of Revision hereinabove referred to, directed attention to the provisions of Laws 1918, Chap. 619, in regard to the date upon which interest upon such award should cease to run and advised the representatives of the corporation counsel of the City of New York that, while the deponent claimed that, under the authorities, the above named applicant might accept the award without barring her right to a review pursuant to a writ of certiorari, deponent preferred to remove any such question by arranging for the stipulation and agreement then requested; and thereafter deponent was informed that the assistant corporation counsel of the City of New York declined to enter into any such arrangement.

45. On information and belief, at all the times mentioned in this affidavit up to January 1, 1898, when The Greater New York Charter went into effect, the Mayor, Aldermen and Commonalty of the City of New York was a domestic municipal corporation duly created by and existing under and by virtue of the laws of the State of New York, upon the enactment of said The Greater New York Charter, by chap. 378, Laws 1897, the said Mayor, Aldermen and
32 Commonalty of the City of New York was merged into the domestic municipal corporation constituted by said last named charter and known as the City of New York, the said last named the City of New York has ever since been and still is a domestic municipal corporation duly created by and existing under the laws of the State of New York and by virtue of the provisions of said The Greater New York Charter and the said merger so effectuated all the duties and obligations of said Mayor, Aldermen and Commonalty of the City of New York devolved to and became operative upon the said the City of New York.

46. On information and belief, said determinations of said Board of Assessors and said Board of Revision of Assessments, namely, the

determinations to be reviewed pursuant to the writ of certiorari to be applied for herein, are determinations finally determining the rights of the parties in respect of the applicant's said claim for damages and in respect of the matters to be reviewed in relation thereto, neither of said determinations can be adequately reviewed by an appeal to a court or to any other body or officer, except that said Board of Revision are in terms authorized by section 944 of the Greater New York Charter, as amended by Laws 1918, chap. 619, to consider, on the merits, all objections made to any award for damage made by said Board of Assessors, and neither said Board of Assessors nor said Board of Revision of Assessments that made said respective determinations is expressly authorized by statute, or otherwise, to rehear the matter upon the application of the applicant or otherwise, and the applicant herein will be irreparably injured and remain remediless in the premises, unless said determination
33 of said Board of Assessors and said determination of said Board of Revision be reviewed by the writ of certiorari to be applied for herein.

47. On information and belief said 155th Street viaduct was constructed, pursuant to Chap. 376 of the Laws of 1887, between July 14, 1890, and October 2, 1893, at an elevation of fifty feet to fifty-eight feet six inches above the grade of said 155th Street on its lower level in front of said premises, and during the period when said viaduct was being erected Section 873 of Chap. 410 of the Laws of 1882, generally known as the New York City Consolidation Act, was in force.

48. On information and belief, as soon as the applicant's intestate sustained damage in respect of his said premises by reason of the erection of said 155th Street viaduct, it became the duty of the Board of Assessors of the City of New York to comply with the directions of said Section 873 of said Consolidation Act and in that behalf to estimate, according to law, the loss and damage that the applicant's said intestate had sustained thereby and to make a just and equitable award of the amount of such loss and damage.

49. On information and belief, when the applicant's intestate sustained damage in respect of his premises by reason of the erection of said 155th Street viaduct, the law then in force afforded to him the right to a review in the Supreme Court of New York, pursuant to a writ of certiorari, of any award of the amount of such loss and damage that such Board of Assessors might make in the premises.

50. As deponent is informed and believes, the municipal authorities of the City of New York, with the active co-operation of said William C. Ormond, caused to be drafted and, on March 15,
34 1916 (less than two months after the decision of the Court of Appeals of the cause generally known as People ex rel. Uvalde A. P. Co. vs. Seaman, 417 N. Y., 70) caused to be introduced into the assembly of the State of New York the bill that subsequently and on May 11, 1916, became Chap. 516, Laws 1916, and by the last mentioned statute Section 951 of the Greater New York

Charter, was amended, so as to prescribe, among other things, as follows:

"The determination of the Board of Revision of Assessments shall be final and conclusive upon all parties and persons interested in all awards made by the Board of Assessors."

Said Section 951 of the Greater New York Charter was again amended by Chap. 619 of the Laws of 1918, and, while the last above quoted provision of that section was omitted therefrom, by the same chapter, Section 944 of the said charter was amended so as to contain the provision that is quoted in Paragraph 16 of this affidavit.

51. As deponent is advised, it is claimed on behalf of the applicant herein that any provision of the Greater New York Charter, as amended either by Chap. 516, of the Laws of 1916, or by Chap. 619 of the Laws of 1918, that assumes to withdraw from the applicant herein the right to review, pursuant to a writ of certiorari, the determinations of said Board of Assessors and said Board of Revision of Assessments, without supplying an alternative remedy equally adequate and efficacious, is null and void and in violation of each of the following constitutional provisions, respectively, to wit: Section 6 of Article I of the Constitution of the State of New York, in that such provision of such statute assumes to deprive the applicant as administratrix as aforesaid of property without due process of law and assumes to authorize the taking of her private property for public use without just compensation; Section 10 of Article I of the Constitution of the United States in that the same purports to be a law impairing the obligation of a contract that existed in favor of the applicant in the premises, and Section 1 of the 14th Amendment of the Constitution of the United States, in that the same assumes to deprive the applicant as administratrix as aforesaid of property without due process of law and assumes to deny to her as such administratrix equal protection of the laws.

52. As deponent is advised, it is claimed on behalf of the applicant herein that the following provision of Chap. 516 of the Laws of 1916, viz:

"The determination of the Board of Revision of Assessments shall be final and conclusive upon all parties and persons interested in all awards made by the Board of Assessors;"

is null and void, as against the applicant's right to a review in this Court pursuant to a writ of certiorari as aforesaid, and in violation of each of the respective constitutional provisions, hereinabove described, upon the grounds and for the respective reasons set forth in Paragraph 51 hereof.

53. As deponent is advised, it is claimed on behalf of the applicant herein that the following provision of Chap. 619, of the Laws of 1918, to wit:

"The confirmation of any such award by the Board of Revision of Assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damages sus-
36 tained;"

is null and void, as against the applicant's right to a review in this court pursuant to a writ of certiorari as aforesaid, and in violation of each of the respective constitutional provisions, hereinabove described, upon the grounds and for the respective reasons set forth in Paragraph 51 hereof.

54. As dependent is advised and verily believes, neither the provisions of Chap. 516, Laws 1916, nor the provisions of Chap. 619, Laws of 1918, hereinabove referred to, providing for a review of the applicant's award by said Board of Revision of Assessments supplies an equally adequate or efficacious remedy to that which was afforded pursuant to a writ of certiorari at the time the relator's intestate sustained damage by reason of the erection of said 155th Street viaduct and thus said provisions and each of them are null and void and in violation of the respective constitutional provisions hereinabove described upon the grounds and for the respective reasons set forth in Paragraph 51 hereof.

55. On information and belief, the above named William C. Ormond as a member of said Board of Assessors participated in the respective determinations of said Board of Assessors that are respectively referred to in People ex rel. Hallock vs. Hennessy, 152 App. Div., 767, aff'd., 206 N. Y., 756; People ex rel. Olin vs. Hennessy, 159 App. Div., 814, and People ex rel. Uvalde A. P. Co. vs. Seaman, 217 N. Y., 70.

56. On information and belief, the above named Louis H. Hahlo as a member of said Board of Revision of Assessments participated in and voted in support of the determination of said Board of Revision that is referred to in People ex rel. Uvalde A. P. Co. vs. Seaman, 217 N. Y., 70.

57. Said William C. Ormond was chairman of the Board of Assessors of the City of New York at the time of the making
37 to the above named applicant of the award hereinabove described and said Louis H. Hahlo was the chairman of said Board of Revision of Assessments of the City of New York, at the time when said award was confirmed by said Board of Revision of Assessments.

58. No previous or other application for the issuance of a writ of certiorari or for any other writ on the premises has ever been made to any court or judge.

Wherefore, the applicant as administratrix as aforesaid, respectfully prays that a writ of certiorari be issued and allowed by this Honorable Court directed to said Louis H. Hahlo, George P. Nicholson and Jacob A. Cantor, as and constituting the Board of Revision of Assessments of the City of New York, and William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and constituting the Board of Assessors of the City of New York, requiring and commanding them and each of them to certify and to return to this Court

their respective records and proceedings in the premises, to the end that each of said determinations in respect of the applicant's said claim for damages may be reviewed, reversed and wholly annulled and to the further end that they, as and constituting said respective boards, may be directed to make to the applicant herein an additional award of damages sustained in the premises, as required by said section 873 of chap. 410 of the Laws of 1882 and in accordance with the principles referred to in the applicant's said objections to said award as set forth in Exhibit 9 annexed hereto; and the applicant respectfully prays that the proposed writ of certiorari, herewith presented,
may be issued and allowed by this Honorable Court in that
38 behalf and for such other and further relief in the premises
as to the Court may seem just and equitable, together with the costs and disbursements of this proceeding.

JOHN M. HARRINGTON.

Sworn to before me this 27th day of January, 1919.
MARCUS M. SCHENK,
Notary Public, Kings County.

Certificate filed in New York Co.

39 *Affidavit of Gertrude Sprotte—Read on Behalf of Defendant.*

New York Supreme Court, New York County.

In the Matter of the Application of GERTRUDE CRANE, as Administratrix of the Goods, Chattels and Credits which were of George W. Sauer, deceased, for a writ of certiorari to be directed to Louis H. Hahlo, George P. Nicholson and Jacob A. Cantor, as and constituting the Board of Revision of Assessments of the City of New York, and William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and constituting the Board of Assessors of the City of New York.

Affidavit.

STATE OF NEW YORK,
County of New York, ss:

Gertrude Sprotte, being duly sworn, deposes and says: That she is a typist employed in the office of John M. Harrington, the attorney for the applicant in the above entitled proceeding; that the affiant typed each of the exhibits annexed hereto and referred to in the accompanying affidavit of John M. Harrington, that each of said exhibits is a true copy of or a true extract from the paper of which it purports to be a copy or an extract; that, after typing said exhibits:
Exhibit 1 hereto annexed was compared by the affiant with a
40 certified copy of the Appellate Division order bearing date
May 18, 1917, and entered in the proceeding generally known as People ex rel. Crane vs. Ormond; Exhibit 2 hereto annexed was

compared by the affiant with a copy of the stenographer's minutes furnished to said John M. Harrington by the official stenographer of said Board of Assessors and contains excerpts from the stenographer's minutes of the testimony given before said Board by John Gerken, a witness called on behalf of the above named applicant, upon the trial of the applicant's claim before said Board; Exhibit 3 hereto annexed was compared by the affiant with a copy of the stenographer's minutes furnished to said John M. Harrington by the official stenographer of said Board of Assessors and contains excerpts from the stenographer's minutes of the testimony given by Gertrude Crane, a witness called on her own behalf, upon said trial; Exhibit 4 hereto annexed was compared by the affiant with matter contained in a typewritten paper received in evidence upon said trial, pursuant to stipulation, as Exhibit 34 and said Exhibit 4 contains excerpts from the testimony that had been given by the late Amelia Dobbs upon the trial of a cause generally known as Sauer vs. The Mayor, as incorporated in said Exhibit 34; Exhibit 5 hereto annexed was compared by the affiant with matter contained in said typewritten paper received in evidence as aforesaid as Exhibit 34 and said Exhibit 5 contains excerpts from the testimony that had been given by the late George W. Sauer upon the trial of said cause generally known as Sauer vs. The Mayor, as incorporated in said Exhibit 34; Exhibit 6 hereto annexed was compared by the affiant with a copy of the stenographer's minutes furnished by the official stenographer of said Board and contains a copy of the stenographer's minutes of the testi-
mony of Frank G. Swartwout, a witness called on behalf of
41 the applicant, given both on his direct and his cross-examination before said Board of Assessors upon the trial of the applicant's said claim for damages; Exhibit 7 was compared by the affiant with a copy of the stenographer's minutes furnished by said official stenographer and contains a copy of the stenographer's minutes of the entire testimony of Henry C. Authenreith given before said Board of Assessors upon the trial of the applicant's said claim for damages; Exhibit 8 hereto annexed was compared by the affiant with a carbon copy of the certificate of awards furnished by said official stenographer and is a copy of the certificate of awards bearing date October 1, 1918, made by said Board of Assessors and, on October 2, 1918, confirmed by the Board of Revision of Assessments of the City of New York; and Exhibit 9 hereto annexed was compared by the affiant with the office copy of the objections filed on behalf of the applicant with said Board of Assessors in respect of the award made to the above named applicant as administratrix as aforesaid in the principal sum of $42,500, said office copy being a carbon copy of the original objections thus filed and said original objections having been typed by the affiant before the same were filed.

GERTRUDE SPROTTE.

Sworn to before me this 27th of January, 1919.

MARCUS M. SCHENK,
Notary Public, Kings County.

Certificate filed in New York Co.

42 EXHIBIT 1.

Copy Order of the Appellate Division in People ex rel. Crane vs. Ormond.

At a Term of Appellate Division of the Supreme Court, in and for the First Judicial Department, held at the Court House thereof, in the County of New York, on the 18th day of May, 1917.

Present—Hon. John Proctor Clarke, P. J.
" Francis M. Scott,
" Walter Lloyd Smith,
" Alfred R. Page,
" Vernon M. Davis, J. J.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Gertrude Crane, as Administratrix of the Goods, Chattels, and Credits, which were of George W. Sauer, Deceased, Relator,

against

WILLIAM C. ORMOND, President; JACOB J. LESSER, ST. GEORGE B. Tucker, as and Constituting the Board of Assessors of the City of New York, and the City of New York, Defendants.

The relator in the above entitled proceeding having sued out a writ of certiorari on the 19th day of December, 1916, to review the determination of the defendants, William C. Ormond, Jacob J. Lesser and St. George B. Tucker, as and constituting the
43 Board of Assessors, in dismissing the relator's claim for damages heretofore filed with said Board of Assessors, and said defendants having made and filed their return to said writ, and said writ and said return, together with the deposition of William H. Jasper, taken pursuant to an order of this Court, bearing date March 15, 1917, having come on to be heard, and after hearing John M. Harrington, of counsel for the relator, and Charles J. Nehrbas, of counsel for defendants, and due deliberation having been had thereon

Now, on motion of John M. Harrington, Esq., attorney for the relator, it is

Ordered, that the said writ of certiorari be, and the same hereby is sustained, that the determination of the Board of Assessors of the City of New York herein be and the same hereby is annulled with Fifty Dollars ($50) costs and disbursements to the relator, that the claim of the relator herein be and the same hereby is remitted to the said Board of Assessors, and said Board is hereby directed to hear and determine the said claim upon the merits according to law.

44 *Hypothetical Question Referred to in Paragraph 26 of the Affidavit to which this Paper is Annexed as an Exhibit.*

45 Q. Mr. Swartwout, assuming that on July 1, 1886, the claimant's intestate, the late George W. Sauer, became the owner in fee simple of five lots of land, situated on the southwest corner of 155th Street and 8th Avenue, in the County of New York, New York; that said lots had a frontage of 49 feet 11 inches on 8th Avenue and of 175 feet on the southerly side of 155th Street; that the 8th Avenue frontage had a depth of 100 feet and 75 feet of the 155th Street frontage had a depth of 100 feet; that, at the time of the conveyance of said premises to claimant's intestate, there stood upon said land certain frame buildings, known as the "Atalanta Casino," which had been used for several years as a place of public resort, recreation and amusement; that the corner building was erected in or about the year 1881 and originally consisted of a three story building, with basement, each floor comprising but a single room, the ground floor being used as a bar room and the two upper floors as dining rooms; that said building covered, approximately, the entire lot, 25 by 100 feet, and at the time of the erection of the viaduct hereinafter described, was upward of 43 feet in height above the 8th Avenue sidewalk; that the height from the first to the second floor was 12 feet 3 inches; that the height from the second to the third floor was 14 feet 11 inches; that the height from the 3rd floor to the edge of the roof was 9 feet 4 inches and from the third floor to the peak of the roof was 18 feet; that the barrooms and upper floors were, approximately, 23 feet ten inches by 99 feet, inside measurement; that the original cost of said building was about $10,000; that, subsequently, and in or about the year 1882, a building similar to the corner building was constructed on the 8th Avenue lot
46 south thereof and said building was of similar construction and size to the corner building as originally erected; that at the same time said southerly building fronting on 8th Avenue was erected, a building was erected on the three lots fronting on the southerly side of 155th Street, commencing 100 feet west of 8th Avenue that was, approximately, 75 feet front by 100 feet in depth, and about 50 to 60 feet in height above the sidewalk of 155th Street after said street was filled in as hereinafter mentioned, said last named building was known as the "Assembly Room" or "Casino" and, as originally constructed, consisted of a so-called basement, the ground floor of which was on a level with the surface of 155th Street before it was filled in, the height of the ceiling of such basement being approximately 12 feet, and over and above such basement, for the entire width and length of the building, said Assembly Room, with a gable roof, was built, the inside measurement of which Assembly Room was approximately, 73 feet 6 inches in front by 99 feet 4 inches in depth and about 50 to 60 feet in height from the floor to the peak of the roof; that, approximately, 12 feet above the floor of said assembly room, a balcony was built all around on four sides of the room, projecting about 12 feet from the side walls thereof; that the roof of

said assembly room was so constructed that by means of ropes and a track on rollers an opening in the roof, approximately, 15 x 30 feet could be made for the purposes of ventilation and by the same means said opening could be closed, if desired; that guests were served with meals and refreshments at tables set upon said balconies as well as in the dining rooms and roof garden contained in the building; that the aggregate cost of said southerly building fronting on 8th Avenue and said Assembly buildings, as originally constructed, was,
47 approximately, $25,000; that about a year or so after the erection of the Casino or Assembly Building, eight bowling alleys were installed in the basement thereof; that after the claimant's intestate, namely, the late George W. Sauer, purchased said premises, and, in or about the year 1886, 155th Street, in front thereof, was filled in to the extent of, approximately, 12 feet, in conformity with its legally established grade; that said George W. Sauer caused to be erected along the 155th Street side of said premises, a retaining wall, approximately, 170 feet in length by, approximately, 20 feet in depth by 5 feet at the bottom and from 2½ to 3½ feet at the top, at a cost of, approximately, $5,000, and made upon said premises certain other improvements at an expense of the additional sum of, approximately, $11,000 to $13,000; that among said improvements, said George W. Sauer caused to be constructed over the two buildings, fronting on 8th Avenue, a roof garden the inside measurement of which was, approximately, 49 feet by 99 feet, around which were colored glass windows and over which there was a permanent roof with a skylight; that said roof garden was subsequently used as a concert hall, that George W. Sauer also caused certain portions of said 8th Avenue buildings to be divided so that said buildings contained at the time of the erection of the viaduct hereinafter mentioned, eighteen bed-rooms, fourteen of which were for the use of said intestate's family and guests and four for the use of his employes, and said building also contained a kitchen in the basement thereof, about 19 feet by 21 feet, and that there were also contained in the basement under said Assembly Room, bowling alleys and billiard tables; that said buildings were so connected that they could be and were actually used as one plant to carry on business therein, as a place of public resort, amusement and entertainment, and
48 were adapted to no other use; that the 155th — entrance was the entrance used by patrons to gain access to the assembly room and to the floors above the barrooms fronting on 8th Avenue; that long before the year 1887, 8th Avenue and 155th Street had been duly designated as public streets and highways according to law and were so used and maintained as such in the City and County of New York; that Bradhurst Avenue is the next avenue running, approximately, north and south, west of 8th Avenue; that substantially parallel with Bradhurst Avenue rises a high bluff, the top of which is about 70 feet above the elevation of Bradhurst Avenue at its intersection with 155th Street; that from the foot of said bluff to the Harlem River, the land is approximately, on a level plane; that, on or about May 6, 1890, the Board of Estimate and Apportionment of the City of New York, duly approved plans and specifications for the

construction of an elevated roadway and bridge, over and along 155th Street, from St. Nicholas Place, a street adjacent to and west of the top of said bluff, to Macombs Dam Bridge over the Harlem River, in the City and County of New York, located near the easterly end of said 155th Street; that, on July 14, 1890, a contract was duly entered into between the City of New York and one Herbert Stewart, as contractor, for the construction of said roadway, bridge or viaduct, according to the plans and specifications that had been approved, as aforesaid; that, on August 4, 1890, work under said contract was begun at or near the corner of 155th Street and 8th Avenue, in front of the premises above mentioned; that such work was carried on continuously until the viaduct was completed and accepted by the authorities of the City of New York; that 155th Street in front of said premises, runs, approximately, east and west and is 100 feet
49 in width; that the viaduct over 155th Street was built upon two lines of iron columns 1' 6" square placed in the roadway of the street; that the curb lines on each side of the street are distant about 10' from the nearest line of columns; that there is a distance of about 43 feet between the center of the columns, measuring east and west, and about 40 feet measuring north and south; that the platform of said viaduct, consisting of a roadway for horses and vehicles, and a sidewalk, six feet wide, on each side thereof, for the use of pedestrians, is about 50 feet to 58 feet 6 inches above the pavement of 155th Street, in front of the premises herein above referred to; that the said platform of the viaduct over 155th Street has an extreme width of about 63 feet; that its southerly edge is distant at right angles about 18 feet 3 inches from the northerly line of the premises formerly belonging to the claimant's intestate; that the platform of the viaduct is built of iron beams on which is laid a pavement of asphalt and paving blocks and is a solid structure from edge to edge; that 8th Avenue in front of said premises is 100 feet in width, and runs, approximately, north and south; that the platform of said viaduct extends into 8th Avenue from the lines of 155th Street and forms a quadrilateral having an extreme length of about 163 feet, north and south, and an extreme width of about 80 feet, east and west; that said viaduct is about 50 feet in height, above the 8th Avenue pavement and has a substantially level surface; that, in front of the premises hereinbefore described, it extends southerly along 8th Avenue for a distance of about 30 feet; that two of the columns, supporting the viaduct, which are 18" square are located upon the sidewalk of 8th Avenue in front of said premises, and about 15 feet 6 inches from the building line thereof; that the extreme westerly edge of the viaduct platform extension into 8th Ave-
50 nue is distant at right angles about 10 feet from the building line of said premises; that the construction of the viaduct over 8th Avenue is of the same character as that of the rest of the structure; that the sidewalks of both 8th Avenue and 155th Street are twenty feet wide, measuring from the building line to the curb; and that the platform or roadway of the viaduct over 155th Street inclines easterly toward Macombs Dam Bridge; that between the supporting columns of the viaduct are placed trusses or rods necessary for its proper construction; that a stairway is built from the platform

of the viaduct within the lines of 155th Street and in front of the above mentioned premises, to the southwesterly corner of 155th Street and 8th Avenue; that there was also erected as a part of the structure, in front of said premises, a platform or passageway on a level with the elevated railway station at 155th Street and 8th Avenue, with which latter platform both the north and south stairways from the main platform or roadway of the viaduct connected; that said lower platform or passageway extended north and south over west 155th Street, and, during the ownership of said premises by claimant's intestate, access was afforded therefrom from the elevated railroad station; that the surfaces of 155th Street and 8th Avenue, in front of said premises, as they existed on July 15, 1887, had not been changed by the erection of the viaduct and the said surfaces of said street remain, as before, open to the public, except for the obstruction from the columns of the viaduct; that during the ownership of said premises by the claimant's intestate, the viaduct was used by the City solely as a public highway for horses, vehicles and foot passengers and for the use and convenience of the public and for no other purpose whatever; that noise, dirt and dust, including particles
51 of horse manure and other refuse, have arisen from the maintenance of the viaduct since its erection; that prior to the commencement of the work for the construction of said viaduct and until the buildings on the premises as aforesaid were destroyed by fire, the premises herein above referred to as the Atalanta Casino were used as a place of public resort, recreation and amusement as aforesaid, and the buildings thereon were not adapted for any other use or business; that one of the halls in said Casino had a seating capacity of approximately 3,000; that, prior to the commencement of the work upon said viaduct, nine or ten thousand patrons usually visited said Casino upon Saturdays, Sundays and Holidays during the Spring, Summer and early Fall, some coming, some going, throughout the day; that the average daily attendance of patrons at the Atalanta Casino prior to the commencement of the viaduct was upward of four times as large as it was after the viaduct was built; that prior to the commencement of the viaduct access from the top of the bluff west of Bradhurst Avenue to the elevated railway station at the intersection of 155th Street and 8th Avenue, was afforded by means of wooden steps built, within the lines of 155th Street, close to the side of the bluff from the top thereof to the bottom and thence along the surface of 155th Street as then existing; that since the erection of the viaduct, the viaduct or upper level of 155th Street is the level adopted by travel, east and west; that, no access was afforded from said Atalanta Casino property to said viaduct; that access from said railway station to the street level at the intersection of 155th Street and 8th Avenue was the same after the erection of the viaduct
52 as before; and that, during the construction of said viaduct 155th Street, in front of said premises was closed, except for a path along the 155th Street sidewalk adjacent to said premises.

Please state what in your opinion as a real estate broker and appraiser was the fair and reasonable market value of said premises in the year 1890, prior to the commencement of the viaduct over 155th Street and 8th Avenue, and also state separately the value of the

land and the value the buildings added to the market value of the land?

53 EXHIBIT 8.

Award of Damages to Gertrude Crane, as Administratrix, etc., and Edward J. Knapp.

Before the Board of Assessors of the City of New York.

In the Matter of the Ascertainment of the Damages to Property Situated in the Block Bounded by Eighth Avenue, West 155th Street, Bradhurst Avenue and West 154th Street, Borough of Manhattan, Caused by the Grading of and the Construction of the Viaduct in West 155th Street between Macombs Dam Bridge and Edgecombe Avenue and in Eighth Avenue—Claims Filed Pursuant to Section 873 of the Consolidation Act and Section 951 of the Greater New York Charter.

Claims having been filed in the office of the Board of Assessors prior to July 1, 1916, by—

Gertrude Crane, et al., with respect to lots 35 to 39 inclusive of block 2047,

Edward J. Knapp and Wesley Wait, with respect to lots 25 to 26 inclusive and 40 to 44 inclusive of block 2047

for damages alleged to have been caused by the grading of and the erection of a viaduct in West 155th Street between Macombs Dam Bridge and Edgecombe Avenue and in Eighth Avenue, Borough of Manhattan, City of New York—

54 After hearing and considering the testimony and evidence offered in support of and in opposition to said claims, and after viewing and inspecting the property claimed to have been injured in accordance with direction of Board of Revision of Assessments, we hereby award as damages, pursuant to Section 873 of the Consolidation Act and Section 981 of the Greater New York Charter, to the following named persons, the following amounts with respect to the property embraced within said claims:

Gertrude Crane, as Administratrix of the Estate of George W. Sauer, deceased, block 2047, lots 35, 36, 37, 38 and 39	$42,500
Edward J. Knapp, as executor of the last will and testament of Samuel T. Knapp, deceased, Block 2047, lots 25, 26, 27 and 28 and 40, 41, 42, 43 and 44	19,500

We have computed interest upon said awards at the rate of six per centum per annum, from the time of the completion and acceptance of the grading to the date set in the published notice for the hearing upon objections to said awards, and said amounts of interest are as follows:

Block 2047, Lots 35, 36, 37, 38 and 39..... $63,750
Block 2047, Lots 25, 26, 27 and 28 and 40, 41, 42, 43 and 44 29,250

Dated New York, October 1, 1918.

WILLIAM C. ORMOND,
ANDREW T. SULLIVAN,
MAURICE SIMMONS,
Board of Assessors.

Exhibit 9—Objections of Gertrude Crane, as Administratrix, etc., to Foregoing Award of Damage.

Before the Board of Assessors of the City of New York.

In the Matter of the Ascertainment of the Damages to Property Situated in the Block Bounded by Eighth Avenue, West 155th Street, Bradhurst Avenue and West 154th Street, Borough of Manhattan, Caused by the Grading of and the Construction of the Viaduct in West 155th Street between Macombs Dam Bridge and Edgecombe Avenue, and in Eighth Avenue—Claim Filed Pursuant to Section 873 of the Consolidation Act and Section 951 of the Greater New York Charter.

Objections.

Gertrude Crane, as administratrix of the goods, chattels and credits which were of George W. Sauer, deceased, in response to the notice published by the Board of Assessors in respect of the completion of awards in the above entitled matter, hereby makes, files and presents her objections in writing to the proposed award in the principal sum of only $42,500, in respect of premises formerly owned by the above named George W. Sauer, and now and formerly designated on the tax maps of the City of New York as block 2047, lots 35, 36, 37, 38 and 39, contained in the report or certificate, not dated,
56 signed by the members of said Board of Assessors and now lodged in the office of the Board of Assessors for examination, to-wit:

1. Said award is insufficient and inadequate.

2. Said award does not constitute a just and equitable award of the amount of the loss and damage sustained by the claimant's intestate in respect of said lands and the improvements thereon, by reason of the erection of the 155th Street viaduct, hereinabove mentioned.

3. In making said award, William C. Ormond, Andrew T. Sullivan and Maurice Simmons, constituting the Board of Assessors, failed to perform the duty imposed upon them by §873 of the Consolidation Act (Laws 1882, chap. 410) to estimate such loss and damage and to make a just and equitable award of the amount thereof.

4. In making said award said Ormond, Sullivan and Simmons, constituting the Board of Assessors of the City of New York, have knowingly and wilfully failed to hear and determine the claimant's

claim for damages "upon the merits according to law," as directed by an order of the Appellate Division of the Supreme Court, First Judicial Department, bearing date May 18, 1917, entered in the certiorari proceeding generally known as People ex rel. Crane vs. Ormond (reported in 178 App. Div., 151, and 221 N. Y., 283), and filed in the office of the Clerk of said Appellate Division on May 22, 1917, a certified copy of which order was filed and entered in the office of the Clerk of the County of New York, on May 23, 1917, and certified copies of which said order were heretofore per-
57 sonally served upon said Ormond, Sullivan and Simmons, in the following particulars, namely:

a. In making said award, said Ormond, Sullivan and Simmons have knowingly and wilfully failed to determine said claim for damages in accordance with the claimant's rights, as declared by the Court of Appeals in People ex rel. Crane vs. Ormond, 221 N. Y., 283;

b. In making said award, said Ormond, Sullivan and Simmons have knowingly and wilfully adopted an erroneous theory of damage, by failing to allow as part of the loss and damage sustained the amount of the depreciation in the market and the rental value of the premises referred to in said claim for damages that resulted from the fact that, since the erection of the 155th Street viaduct, practically and substantially 155th Street as used passes on a level 50 feet or more above said premises;

c. In making said award, said Ormond, Sullivan and Simmons have knowingly and wilfully adopted an erroneous theory of damage by failing to allow as part of the loss and damage sustained the entire amount of the depreciation in the market value and the rental value of said premises that resulted from the fact that, upon the erection of said viaduct, the viaduct level has been the level adopted by travel east and west and by allowing only a portion, if any, of the amount of the depreciation thus resulting;

d. In making said award, said Ormond, Sullivan and Simmons have knowingly and wilfully adopted an erroneous theory of
58 damages by substituting, in the place of the law of the case as announced by the Court of Appeals, their own theory to the effect that there can be no recovery for the depreciation resulting from the facts mentioned in subdivisions *b* and *c* hereof for the alleged reason that such depreciation arose solely because of a "diversion of traffic" analogous to the diversion of traffic that is occasioned wherever a new and more convenient way of travel is furnished by any public improvement;

e. In making said award, said Ormond, Sullivan and Simmons have knowingly and wilfully adopted an erroneous theory of damage by failing to allow as part of the loss and damage sustained the amount of the depreciation in the market value and the rental value of said premises that resulted from the fact that access from said premises to said 155th Street viaduct was denied to the claimant's intestate and by substituting, in the place of the law of the case as announced by the Court of Appeals in that connection, the theory

that from an upper story of any building constructed upon said premises a ramp or bridge could be built over the intervening space of 18 feet and 3 inches so to connect such building with said viaduct;

f. In making said award, said Ormond, Sullivan and Simmons have knowingly and wilfully failed to include as an element of the loss and damage, for which the claimant is entitled to recover, the full amount of damage resulting to her intestate by reason of the loss in rental value of his said premises during the construction of said viaduct from August 4, 1890, to October 2, 1893, as required by the law of the State of New York;

g. In making said award, said Ormond, Sullivan and Simmons have knowingly and wilfully failed to determine, in good faith, the amount of the loss and damage sustained in accordance with the weight and preponderance of the evidence adduced before them;

h. In making said award, said Ormond, Sullivan and Simmons have knowingly and wilfully violated the law of the State of New York by making an award in an amount less than that shown by the testimony and admissions of the only alleged expert witness examined before them on behalf of the city;

i. In making said award, said Ormond, Sullivan and Simmons, without warrant in law, have knowingly and wilfully disregarded the testimony adduced on behalf of the claimant in respect of the amount of the loss and damage sustained in the premises;

j. Upon the trial of said claim before them, said Ormond, Sullivan and Simmons, constituting said Board of Assessors, refused, over the claimant's offer and exception, to permit John Gerken, a witness called on behalf of the claimant, to testify as to his opinion in respect of the value of the premises referred to in said claim for damages before and after the erection of said viaduct, notwithstanding that the record before them showed that said Gerken was a qualified and competent witness in that behalf;

k. Upon the trial of said claim before them, said Ormond, Sullivan and Simmons, constituting said Board of Assessors, refused, over the claimant's offer and exception, to permit the claimant to show that her intestate's said premises was of enhanced value by reason of its adaptability to the particular use to which it was put, by establishing by said John Gerken the fact that, prior to the commencement of the 155th Street viaduct, one Wendel, who was engaged in a similar business to that conducted on said intestate's premises, requested said Gerken to make an offer to the claimant's intestate of the sum of $150,000 for said premises or, in the alternative, to endeavor to negotiate a lease thereof for the term of twenty-one years at an approximate yearly rental of $12,000, and that that offer was communicated to the claimant's intestate and declined; and

l. Upon the trial of the said claim, over the claimant's objection and exception, said Ormond, Sullivan and Simmons, constituting said Board of Assessors, accepted the testimony of one Henry O. Authenrieth as an expert witness on behalf of the City, without

sufficient evidence to establish that he was a competent witness to express an opinion as to the value of said premises before and after the erection of the viaduct.

5. The claimant also objects to said report or certificate so signed by said members of the Board of Assessors and lodged in their office in so far as said certificate states that said award includes any part of the loss and damage alleged to have been caused by the grading of west 155th Street, Borough of Manhattan, New York City,
61 upon the ground that said statement, contained in the title of said certificate as well as in the body thereof is erroneous and illegal and has no foundation in any evidence adduced before said Board of Assessors, the claim for damages in respect of which said award has been made being expressly confined to the loss and damage sustained by reason of the erection of the 155th Street viaduct, and the loss and damage sustained by reason of the grading of west 155th Street, upon its lower level, in front of the premises hereinabove referred to, having been made the subject of a separate claim for damages filed with the Board of Assessors of the City of New York on June 30, 1916, and no action in respect of the latter claim having ever been taken by said Board of Assessors; and on the further ground that the erection of the 155th Street viaduct does not constitute a grading of 155th Street, but does constitute a change of grade of that street.

6. The claimant further objects to the amount of interest as computed by said Board, upon the ground that the principal amount upon which such interest has been computed, is not the principal amount of the loss and damage sustained in the premises, as more fully hereinabove set forth.

Wherefore claimant prays that the Board of Assessors and the Board of Revision of Assessments reconsider the proceedings heretofore had herein, and make a just and equitable award of damages in accordance with the weight and preponderance of the evidence heretofore adduced before the Board and the Board of Revision of Assessments and in accordance with the appropriate principles of law as announced by the courts of the State of New York; and
62 that such award be made payable to Gertrude Crane as administratrix of the goods, chattels and credits which were of George W. Sauer, deceased.

Dated New York, September 16, 1918.

GERTRUDE CRANE,
As Administratrix of the Goods, Chattels and Credits which were of George W. Sauer, Deceased, Claimant,
By JOHN M. HARRINGTON,
Attorney for Claimant.

Office and Post Office Address, 16 Exchange Place, Borough of Manhattan, New York City.

HERBERT H. GIBBS,
Of Counsel.

63 *Opinion of Mr. Justice Luce.*

(Reported in New York Law Journal of August 4, 1914.)

PEOPLE ex Rel. CRANE

vs.

HAHLO et al.

The City seeks to vacate the writ of certiorari to renew the award of the Board of Revision and Board of Assessors for damages to relator's intestate's property caused by the change of grade of West One Hundred and Fifty-fifth Street, Manhattan, on the ground that sections 944 and 950 of the Greater New York Charter make the award of those boards final and conclusive. That the Legislature, by Chapter 516, Laws of 1916, and Chapter 619, Laws of 1918, attempted to take from the Supreme Court all power to review the Boards' award for change of grade damages is apparent. The relator challenges the constitutionality of these statutes upon the ground that the right to damages was vested prior to the enactment of Chapter 516, Laws of 1916, and Chapter 619, Laws of 1918, and that under statutes existing prior to 1894 the relator's right to a review of the Board's action existed, and such right was continued by Section 1 of Article VI of the Constitution. Chapter 576, Laws of 1887, authorized the construction of the One Hundred and Fifty-fifth street viaduct. Section 873 of the Consolidation Act (Chap. 410, Laws of 1882) vested in the Board of Assessors authority to make an award for damages sustained by a change in an established grade of a street. Prior to the enactment of Chapter 516, Laws of 1916, and Chapter 619, Laws of 1918, the awards of the Board of Assessors and decision of the Board of Revision on appeal were subject to review by certiorari, since the action of those boards in making awards for change of grade damages is judicial and not administra-
64 tive (People ex rel. Uvalde Asphalt Paving Co. vs. Seamon, 217 N. Y., 70). Section 1, Article VI, of the Constitution continued the Supreme Court with general jurisdiction in law and equity. The viaduct was completed in 1893, and its construction was a change of the grade of One Hundred and Fifty-fifth Street (People ex rel. Crane vs. Ormond, 221 N. Y., 283). The relator's intestate's right to damages caused by this change of grade became vested as soon as such change of grade was effected. That right being vested, and the Supreme Court having jurisdiction to review the action of the Boards upon an application to have such damages fixed, that jurisdiction cannot now be taken from the Court by statute; the jurisdiction is fixed and defined by the constitution (People ex rel. Mayor vs. Nichols, 79 N. Y., 582; De Hart vs. Hatch, 3 Hun, 375; Matter of Public Service Comm'n vs. B'klyn Heights R. R., 105 Misc., 254). It follows that the relator's rights to the writ is not affected by the amendments to the charter relied upon by the City. Motion denied, with $10 costs.

65 *Waiver of Certification.*

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Appellate Division, the order appealed from, the opinion of the Court and all the papers upon which said order and opinion are founded, all of which are now on file in the office of the Clerk of the County of New York; and certification thereof pursuant to Sections 1353 and 3301 of the Code of Civil Procedure or otherwise is hereby waived.

Dated New York, September 30th, 1919.

JOHN M. HARRINGTON,
Attorney for Relator-Respondent.
WILLIAM P. BURR,
Corporation Counsel,
Attorney for Defendant-Appellant.

66 *Notice of Appeal to the Court of Appeals.*

New York Supreme Court, County of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Gertrude Crane, as Administratrix of the Goods, Chattels and Credits which were of George W. Sauer, Deceased, Relator-Respondent,

against

LOUIS H. HAHLO, GEORGE P. NICHOLSON, and JACOB A. CANTOR, as and Constituting the Board of Revision of Assessments of the City of New York, and William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and Constituting the Board of Assessors of the City of New York, and The City of New York, Defendants-Appellants.

Sirs:

Please take notice that pursuant to leave granted by the Appellate Division of the Supreme Court, First Department, in an order entered in the office of the Clerk of said Court on or about the 26th day of December, 1919, the defendants in the above entitled proceeding hereby appeal to the Court of Appeals of the State of New York from
67 the order of the Appellate Division of the Supreme Court, First Department, dated and entered in the office of the Clerk of said Appellate Division on or about the 31st day of October, 1919, which said order affirmed the order herein dated and entered in the office of the Clerk of the County of New York on or about the 9th day of August, 1919, denying defendants' motion to dismiss the writ

of certiorari, and the said defendants appeal from each and every part of said order, as well as from the whole thereof.

Dated New York, December 27, 1919.

Yours, etc.,

WILLIAM P. BURR,
Corporation Counsel,
Attorney for Defendants-Appellants.

Office and Post Office Address, Municipal Building, Borough of Manhattan, City of New York.

To John M. Harrington, Esq., Attorney for Relator-Respondent, 16 Exchange Place, Borough of Manhattan, City of New York; William F. Schneider, Esq., Clerk, County of New York.

Order of Affirmance.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 31st day of October, 1919.

Present—Hon. John Proctor Clarke,
Presiding Justice,
" Frank C. Laughlin,
" Walter Lloyd Smith,
" Alfred R. Page,
" Eugene A. Philbin, Justices.

4236.

THE PEOPLE ex Rel. GERTRUDE CRANE, as Administratrix, &c., Respt.,

vs.

LOUIS H. HAHLO, GEORGE P. NICHOLSON, and JACOB A. CANTOR, as and Constituting the Board of Revision and Assessments of the City of New York, and William C. Ormond, Andrew T. Sullivan and Maurcie Simmons, as and Constituting the Board of Assessments of the City of New York, and The City of New York, Applts.

Affirmance of Order.

An appeal having been taken to this Court by the defendants from an order of the Supreme Court, New York County, entered the 9th day of August, 1919, denying defendants' motion to dismiss writ of certiorari, and said appeal having been argued by Mr. Charles J. Nehrbas, of counsel for the appellants, and by Mr. John M. Harrington, of counsel for the respondent, and due deliberation having been had thereon, it is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed, with $10 costs and disbursements.

70 *Order Granting Leave to Appeal to the Court of Appeals.*

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York, on the 26th Day of December, 1919.

Present—Hon. John Proctor Clarke, Presiding Justice.
" Victor J. Dowling,
" Walter Lloyd Smith,
" Alfred R. Page,
" Eugene A. Philbin,
Justices.

25.

THE PEOPLE ex Rel. GERTRUDE CRANE, as Admx., &c., Respt.,

vs.

LOUIS H. HAHLO, GEORGE P. NICHOLSON and JACOB A. CANTOR, as and Constituting the Board of Revision of Assessments, and William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and Constituting the Board of Assessors, &c., and The City of New York, Applts.

The above named defendants having moved for leave to appeal to the Court of Appeals from the order of this Court entered herein on the 31st day of October, 1919,

71 Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Charles J. Nehrbas in support of said motion, and after hearing Mr. Charles J. Nehrbas for the motion, and Mr. Herbert H. Gibbs, of counsel for relator, joining in said application,

It is hereby ordered that said motion be and the same hereby is granted; and this Court hereby certifies that in its opinion questions of law are involved which ought to be reviewed by the Court of Appeals, as follows:

1. Has the Appellate Division of the Supreme Court the power in this proceeding to review the determination of the Board of Assessors of the City of New York, confirmed by the Board of Revision of Assessments of the City of New York, (*a*) in respect of questions as to whether, in making the determination assessing the amount of damage sustained, any rule of law affecting the relator's rights has been violated, to the prejudice of the relator? (*b*) with respect to any question concerning the amount awarded as damages?

2. Is the following provision contained in §944 of the Greater New York Charter, as amended by Chapter 619 of the Laws of 1918, void because of conflict with Section 1 of Article VI, or Section 6 of Article 1, or any other provisions of the Constitution of the State of New York:

"The confirmation of any such award by the board of re-
72 vision of assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained"?

3. Is the said provision contained in said §944 of the Greater New York Charter void because of conflict with Section 10 of Article 1 of the Constitution of the United States, or Section 1 of the 14th Amendment to said Constitution, or any other provision of the Constitution of the United States?

73 *Opinion of Appellate Division on Motion for Leave to Appeal to the Court of Appeals.*

Supreme Court, Appellate Division, First Department.

December, 1919.

John Proctor Clarke, P. J.; Victor J. Dowling, Walter Lloyd Smith, Alfred R. Page, Eugene A. Philbin, JJ.

Motion No. 25, Dec. 19, 1919.

THE PEOPLE ex Rel. GERTRUDE CRANE as Admx., etc., Respondent,

vs.

LOUIS HAHLO et al., etc., and Others, Appellants.

Motion for leave to appeal to the Court of Appeals from an order of this Court affirming an order of the Supreme Court which denied defendants' motion to dismiss a writ of certiorari.

Charles J. Nehrbas, for the motion.
Herbert H. Gibbs, for relator, joining therein.

74 Per CURIAM:

On the motion to quash the writ, the majority of the Court were of opinion that the relator's rights became vested before the amendment of §944 of the Greater New York Charter in 1918, on which the defendants rely, was enacted, and that the section as so amended does not expressly preclude a review on certiorari under sub-division 2 of §2120 of the Code of Civil Procedure, with respect to whether under sub-division 3 of §2140 of the Code of Civil Procedure, any rule of law affecting the right of the relator has been violated by the assessors to her prejudice, and, therefore, we, without opinion, denied the motion. But since it is now urged by the defendants that like points of law are involved in numerous other pending proceedings, and all parties join in requesting that we grant leave to appeal and certify questions to be reviewed; and, further, on the ground that much time and considerable expense will be avoided by the course

suggested—we have concluded to allow the appeal and certify the questions presented.

The motion is therefore granted, and the questions requested by both parties will be certified for review.

75 *Affidavit of No Opinion on Affirmance of Order.*

STATE OF NEW YORK,
County of New York, ss:

J. H. Greener, being duly sworn, says that he is Chief Clerk in the office of the Corporation Counsel of the City of New York; that no written opinion or memorandum was handed down by the Appellate Division in deciding the appeal herein.

J. H. GREENER.

Sworn to before me this 10th day of January, 1920.

PETER S. PRUNTY,
Commissioner of Deeds, City of New York.

76 *Waiver of Certification.*

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Court of Appeals, the order of affirmance, order granting leave to appeal to the Court of Appeals, the opinion of the Appellate Division on the motion for leave to appeal to the Court of Appeals, and all the papers upon which the said order of affirmance is founded, all of which are now on file in the office of the Clerk of the County of New York; and certification thereof pursuant to Sections 1315 and 3301 of the Code of Civil Procedure or otherwise is hereby waived.

Dated New York, January 10th, 1920.

JOHN M. HARRINGTON,
Attorney for Relator-Respondent.
WILLIAM P. BURR,
Corporation Counsel,
Attorney for Defendants-Appellants.

77 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 13th day of April in the year of our Lord one thousand nine hundred and twenty, before the Judges of said Court.

Witness, the Hon. Frank H. Hiscock, Chief Judge, presiding.

R. M. BARBER,
Clerk.

Remittitur, April 14, 1920.

THE PEOPLE, etc., ex rel. GERTRUDE CRANE, as Admrx., etc., Respondent,

against

LOUIS H. HAHLO & ORS., etc., Appellants.

Be it remembered, that on the 22nd day of January in the year of our Lord one thousand nine hundred and twenty, Louis H. Hahlo and ors. etc., the appellants in this cause came here into the Court of Appeals, by William P. Burr, their attorney and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department, and Gertrude Crane, as Admrx. etc., the respondent in said cause, afterward appeared in said Court of Appeals by John M. Harrington, her attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

78 Whereupon, the said Court of Appeals having heard this cause argued by Mr. Charles J. Nehrbas, of counsel for the appellants, and by Mr. John M. Harrington, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the orders herein be and the same hereby are reversed and questions certified answered in negative, and motion to dismiss proceeding granted, with costs in all courts.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Appellate Division of the Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said orders be reversed and questions certified answered in negative and motion to dismiss proceeding granted, with costs in all courts, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division of the Supreme Court before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office.

Albany, April 14, 1920.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[Seal State of New York, Court of Appeals.]

R. M. BARBER,
Clerk.

79 STATE OF NEW YORK,

In Court of Appeals.

At a Court of Appeals for the State of New York, held at the Court of Appeals Hall in the City of Albany, on the eighth day of June A. D. 1920.

Present, Hon. Frank H. Hiscock, Chief Judge, presiding.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Gertrude Crane, as Administratrix of the Goods, Chattels and Credits which were of George W. Sauer, Deceased, Relator-Respondent,

vs.

LOUIS H. HAHLO, GEORGE P. NICHOLSON and JACOB A. CANTOR, as and Constituting the Board of Revision of Assessments of The City of New York, and William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and Constituting the Board of Assessors of the City of New York, and the City of New York, Defendants-Appellants.

A motion having been heretofore made upon the part of the relator-respondent to recall the remittitur of this court herein and to amend the same, and papers having been duly submitted thereon and due deliberation thereupon had:

Ordered, that said motion be and the same hereby is granted and the remittitur recalled and directed to be amended by inserting therein the following:

"And the relator-respondent in the above entitled proceeding having drawn in question in this court (*a*) the validity of the
80 following provision contained in section 944 of the Greater New York Charter, as amended by chapter 619 of the Laws of 1918 of the state of New York, namely, 'the confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained,' and the authority exercised

thereunder, on the ground of their being repugnant to section 10 of Article I of the Constitution of the United States forbidding a state to pass any law impairing the obligation of contracts, (*b*) the validity of said provision contained in said section 944 of the Greater New York Charter, as amended as aforesaid, and the authority exercised thereunder, on the ground of their being repugnant to section 1 of the 14th Amendment of the Constitution of the United States providing that no state shall deprive any person of property, without due process of law, and (*c*) the validity of said provision contained in said section 944 of the Greater New York Charter, as amended as aforesaid, on the ground of their being repugnant to said section 1 of the 14th Amendment of the Constitution of the United States providing that no state shall deny to any person within its jurisdiction the equal protection of the laws, we hold (1) that said statute does not conflict with the provision of section 10 of Article I of the Constitution of the United States forbidding a state to pass any law impairing the obligation of contracts, (2) that said statute does not offend against the provision of section 1 of the 14th Amendment of the Constitution of the United States providing that no state shall deprive any person of property without due process of law, (3) that said statute does not contravene the provision of section 1 of the 14th Amendment of the Constitution of the United States providing that no state shall deny to any person within its jurisdiction the equal protection of the laws, (4) that the appellate division of the Supreme Court of New York has no power to review the determination of the board of assessors of the city of New York, confirmed by the board of revision of assessments of the city of New York, with respect to any question concerning the amount awarded as damages, and (5) that the orders appealed from must be reversed and the motion to dismiss the relator's proceeding granted."

81 And the return of said remittitur to the clerk of this court is hereby requested for the purpose of amendment as aforesaid.

(A Copy.)

[Seal of Court of Appeals.]

R. M. BARBER,
Clerk.

[Endorsed:] State of New York. In the Court of Appeals. People etc. ex rel. Gertrude Crane as Administratrix etc., Relator-Respondent, vs. Louis H. Hahlo et al. etc., William C. Ormond et al etc., and The City of New York, Defendants-Appellants. Order Amending Remittitur.

82 At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the 21st Day of June, 1920.

Present—Hon. John Proctor Clarke, P. J.; Hon. Victor J. Dowling, Hon. Walter Lloyd Smith, Hon. Alfred R. Page, Hon. Samuel Greenbaum, JJ.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Gertrude Crane, as Administratrix of the Goods, Chattels and Credits Which Were of George W. Sauer, Deceased, Relator-Respondent,

against

LOUIS H. HAHLO, GEORGE P. NICHOLSON and JACOB A. CANTOR, as and Constituting the Board of Revision of Assessments of The City of New York, and William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and Constituting the Board of Assessors of The City of New York and The City of New York, Defendants-Appellants.

Order on Remittitur of Court of Appeals.

The defendants in the above entitled proceeding having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, first judicial department, bearing date and entered in the office of the clerk of said Appellate Division on October 31, 1919, affirming the order in the above entitled proceeding made at a Special Term of said Supreme Court bearing date and entered in the office of the clerk of New York County on August 9, 1919, denying defendant's motion to dismiss the writ of certiorari herein, pursuant to an order of this court bearing date December 26, 1919, granting leave thus to appeal
83 and certifying to the Court of Appeals the following questions of law, namely:

"1. Has the Appellate Division of the Supreme Court the power in this proceeding to review the determination of the Board of Assessors of the City of New York, confirmed by the Board of Revision of Assessments of the City of New York (*a*) in respect of questions as to whether, in making the determination assessing the amount of damage sustained, any rule of law affecting the relator's rights has been violated, to the prejudice of the relator? (*b*) with respect to any question concerning the amount awarded as damages?

2. Is the following provision contained in §944 of the Greater New York Charter, as amended by Chapter 619 of the Laws of 1918, void because of conflict with Section 1 of Article VI, or Section 6 of Article I, or any other provisions of the Constitution of the State of New York:

'The confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained?'

3. Is the said provision contained in said §944 of the Greater New York Charter void because of conflict with Section 10 of Article 1 of the Constitution of the United States, or Section 1 of the 14th Amendment to said Constitution, or any other provision of the Constitution of the United States?"

and it appearing by the remittitur herein sent down by the Court of Appeals, as amended by an order of said Court of Appeals bearing date and entered in the office of the clerk of said last named court on June 8, 1920, that said appeal came on duly to be heard in its regular order and was argued by counsel for the respective parties and that the Court of Appeals after due deliberation did by an order and judgment dated and entered in the office of the clerk of said Court of Appeals on April 13, 1920, as amended by said order dated June 8, 1920, order and adjudge that the said orders so ap-
84 pealed from be reversed and the questions certified answered in the negative and the motion to dismiss the proceeding granted with costs in all courts; that, the relator-respondent in the above entitled proceeding having drawn in question in said Court of Appeals (*a*) the validity of the following provision contained in section 944 of the Greater New York Charter as amended by chapter 619 of the Laws of 1918 of the State of New York, namely 'the confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained,' and the authority exercised thereunder, on the ground of their being repugnant to section 10 of Artice I, of the Constitution of the United States forbidding a state to pass any law impairing the obligation of contracts, (*b*) the validity of said provision contained in said section 944 of the Greater New York Charter, as amended as aforesaid, and the authority exercised thereunder, on the ground of their being repugnant to section 1 of the 14th Amendment of the Constitution of the United States providing that no state shall deprive any person of property, without due process of law, and (*c*) the validity of said provision contained in said section 944 of the Greater New York Charter, as amended as aforesaid, on the ground of their being repugnant to section 1 of the 14th Amendment of the Constitution of the United States providing that no state shall deny to any person within its jurisdiction the equal protection of the laws, the said Court of Appeals did hold (1) that said statute does not conflict with the provision of section 10 of Article I, of the Constitution of the United States forbidding a state to pass any law impairing the obligation of contracts, (2) that said statute does not offend against
85 the provision of section 1 of the 14th Amendment of the Constitution of the United States providing that no state shall deprive any person of property without due process of law, (3) that said statute does not contravene the provision of section 1 of the 14th Amendment of the Constitution of the United States providing that

no state shall deny to any person within its jurisdiction the equal protection of the laws, and (4) that the appellate division of the Supreme Court of New York has no power to review the determination of the board of assessors of the city of New York, confirmed by the board of revision of assessments of the city of New York, with respect to any question concerning the amount awarded as damages; and did further order and adjudge that the record of proceedings in the Court of Appeals be remitted to the Appellate Division of the Supreme Court, first judicial department, there to be proceeded upon according to law.

Now, upon reading and filing the said remittitur from the Court of Appeals, as amended by said order bearing date June 8, 1920, which remittitur and a certified copy of said order are hereto annexed, and on motion of John P. O'Brien, corporation counsel, attorney for the defendants-appellants, it is

Ordered and adjudged that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court.

871 [Endorsed:] Index Number 2608. Year 1919. New York Supreme Court. Appellate Div., First Dept. People etc. ex rel. Gertrude Crane, as administratrix etc., relator-respondent, vs. Louis H. Hahlo et al., etc., William C. Ormond et al., etc., and The City of New York, defendants-appellants. Order on remittitur from Court of Appeals. John M. Harrington, attorney for relator-respondent, 154 Nassau Street, Borough of Manhattan, New York City, New York.

876 STATE OF NEW YORK,
State Reporter's Office, ss:

Court of Appeals.

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of People of the State of New York ex Rel. Gertrude Crane, as Administratrix, &c., Respondent, against Louis H. Hahlo and Others, Appellants, decided by the Court of Appeals on the thirteenth day of April, 1920, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 23rd day of June 1920.

[Seal of State of New York Court of Appeals.]

J. NEWTON FIERO,
As Reporter of the Court of Appeals of the State of New York.

Attest:
[L. S.] WM. J. ARMSTRONG,
Deputy Clerk of the Court of Appeals.

STATE OF NEW YORK:

Court of Appeals.

I, Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that Wm. J. Armstrong is the Deputy clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication, by said deputy clerk and said reporter of the annexed copy of the official opinion rendered in the case of People of the State of New York ex Rel. Gertrude Crane, as Administratrix, &c., Respondent, against Louis H. Hahlo and Others, Appellants, decided by the said Court of Appeals on the thirteenth day of April, 1920, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of Wm. J. Armstrong, as deputy clerk of said court, appended thereto is the true and genuine signature of said Wm. J. Armstrong, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall, in the City of Albany and State of New York, on the 25th day of June, in the year one thousand nine hundred and twenty.

FRANK H. HISCOCK,
As Chief Judge of the Court of Appeals
of the State of New York.

87 *Opinion of the Court of Appeals, State of New York.*

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. GERTRUDE CRANE, as Administratrix of the Estate of George W. Sauer, Deceased, Respondent,

v.

LOUIS H. HAHLO et al., Constituting the Board of Revision of Assessments of the City of New York et al., Appellants.

(Decided April 13, 1920.)

Appeal, by Permission, from an Order of the Appellate Division of the Supreme Court in the First Judicial Department, Entered October 31, 1919, Which Affirmed an Order of Special Term Denying a Motion to Dismiss a Writ of Certiorari.

William P. Burr, Corporation Counsel (Charles J. Nehrbas of counsel), for appellants.

John M. Harrington, for respondent.

HISCOCK, *Ch. J.* This appeal is the last step in long-continued proceedings instituted by the respondent's intestate to secure damages for a change in the grade of the street in front of his premises which was completed in 1893. It is unnecessary for the purposes of the appeal to review or even to enumerate all of the different steps which have been taken for the enforcement of such claim. It is sufficient to say that there was finally reached a pont in September, 1917, when the relator in accordance with the statute produced before the board of assessors of the city of New York evidence in support of her intestate's claim; that an award of $40,000 was made by said board; that on appeal to the board of revision of assessments of said city the claim was remitted to the board of assessors with instructions to increase the award from $40,000 to $72,500, which was done, and this last award on appeal was confirmed by the board of revision.

Asserting that in the consideration of her claim various principles of law were ignored and various elements of damage disregarded wherefrom great inadequacy in the amount of the award resulted, the relator sued out a writ of certiorari for the purpose of securing relief from these alleged errors. Thereupon the appellants made the motion now being reviewed on this appeal to dismiss such certiorari proceedings on the ground that under and by the provisions of section 944 of the Greater New York charter in force at the time said award was made (L. 1901, ch. 466, and by L. 1918, ch. 619), it was provided that "The confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained." In opposition to this motion it was alleged and thus far has been held that this provision did not and could not have the effect to deprive relator of resort by certiorari to the Supreme Court for relief

from the errors complained of, and out of this decision have arisen various questions concerning the meaning and constitutionality of the provision for finality in question which are now submitted
88 to us for answer. Without repeating at length these questions they may be summarized according to our understanding as asking whether said provision was intended to prevent a review by certiorari of errors of law and fact committed by the boards of revision and assessors in determining the amount of damages to be awarded, and second whether if so intended said enactment is in violation of various constitutional provisions, State and Federal protecting property rights, and especially of section 1, article 6 of the State Constitution which declares that "The Supreme Court is continued with general jurisdiction in law and equity."

Assuming that the provision under review is constitutional, we think that it was intended to include and prevent a writ of certiorari as a method of reviewing the action of the boards of revision and assessment. The natural and ordinary understanding of a provision that the action of a tribunal shall be final and conclusive would be that such action should not be subject to review and reversal which would prevent it from being thus final and conclusive. It is argued, however, that this ordinary understanding is prohibited as to certiorari by section 2120 of the Code, which in effect provides that a writ of certiorari may be issued where the right thereto "is not expressly taken away by statute," and it is contended that this provision simply making the action of an inferior tribunal final and conclusive does not meet the test of explicitness required by the statute. We think that this calls for too literal and narrow an interpretation of the enactment before us and we are aided to this conclusion by earlier consideration of such a clause.

Before the enactment of this section of the Code it had been first held that the right to a writ of certiorari to review the action of an inferior tribunal was not destroyed by a provision that such action should be final and conclusive. (Leroy v. Mayor, etc., of N. Y., 20 Johns. 430; People ex rel. A. & E. Plank Road Co. v. Freeman, 3 Lans. 148.) This view was overruled, however, in People ex rel. S. & U. H. Railroad Co. v. Betts (55 N. Y. 600), where it was held that a statutory provision that a second report in condemnation proceedings should be "final and conclusive on all parties interested" was an "express prohibition of the statute" which barred common-law certiorari proceedings as well as any other proceeding for a review and correction of error. When, after this, the Code provided that certiorari proceedings were only barred "when expressly taken away by statute" it would seem that the revisers and the legislature must have had in view the decision in the Betts case that a provision that action should be final and conclusive was an "express prohibition" which covers certiorari proceedings.

There is, however, still more to be said in support of this interpretation of the present prohibition. In the case of People ex rel. Uvalde A. Paving Co. v. Seaman, 217 N. Y. 70, this court said that the provisions of the New York charter then in force did not provide that the action of the board of revision should be final but that

"where a statute prescribes that a specified determination shall be final and conclusive it is a bar as well to a review by common-law certiorari as by appeal." (p. 75). While that statement was
89 not strictly necessary to the decision of the case then before the court it was a perfectly natural corrol-ary to what was being decided and was not said without consideration. After this expression by the court the present provision for finality was adopted. We have no doubt that actually the legislature had in mind what had so recently been said by this court and theoretically we must assume that it had in mind the provision of the Code concerning writs of certiorari which has been called to our attention. Under these circumstances and on such assumption we feel compelled to hold that the legislature in adopting the provision for finality and conclusiveness intended it as that express withdrawal of the right to review by certiorari which is required by the Code.

I also think the provision includes within its prohibition against review the kind of questions which relator is seeking to review and which under the interrogatories submitted to us we understand to involve rules governing the subject of damages. We shall assume that this provision excluding review even if not limited by its own terms to the subject of damages would not prevent the consideration on certiorari of questions of jurisdiction, fraud and willful misconduct on the part of the officials composing the boards. (Matter of So. Boulevard R. R. Co., 143 N. Y. 253.) It is also true that relator's petition in words alleges arbitrariness on the part of these officials. We think, however, that the entire petition makes it clear that her complaint is against prejudicial rulings resulting from erroneous views of the law and facts rather than misconduct which was corrupt, willful or intentionally disregardful of relator's rights, and we shall proceed upon that theory.

It was undoubtedly the purpose of the statute to prevent review of such honest errors, so far as they affected damages. There would be little object in or result from a statute making the determination conclusive as to damages if its only meaning was that the award should only be conclusive when no possible error had crept into the computation and that it should not be conclusive if there was any such error. That interpretation would leave the award in pretty much the same status as it would have had if there had been no such provision. The theory and end of such an enactment are well understood. It embodies the policy that the greater good is sometimes served by making certain classes of decisions final and ending litigation even though in a particular case the individual is prevented by review from correcting some error which has injured him. The legislature doubtless yielded to this view in the case of this statute and we think a proper interpretation of its language forbids a review of the questions suggested by the Appellate Division. (Matter of So. Boulevard R. R. Co., 143 N. Y. 253.)

That the legislature has the right, its action otherwise being valid and constitutional, to limit the right of appeal or review is too well settled to be the subject of any doubt. (Railroad Co. v. Grant, 98

U. S. 398; Smith v. District Court, etc., 4 Colo. 235; Grover v. Coon, 1 N. Y. 536; People v. Dunn, 31 App. Div. 139; Croveno v. Atlantic Ave. R. R. Co., 150 N. Y. 225). This is true of its power to cut off the right to an appeal even in pending litigation. (Railroad Co. v. Grant, supra.; Smith v. District Court, etc., supra.)

So we come to the consideration of the questions submitted concerning the constitutionality of this provision. We think that those questions involving constitutional provisions securing to respondent and her intestate protection of property rights are largely merged in and covered by the question whether the provision which we are considering violates the constitutional provision defining the jurisdiction of the Supreme Court. If relator's claim was of a character which permitted the legislature to send it to the boards of assessors and of revision for hearing and determination, the claimant in other respects secured the protection of those fundamental features which were essential to a fair consideration of her rights. She was secured in the right to be heard fully and to produce evidence in support of her claim and to examine witnesses who might be called against her. The officials who heard her claim were not disqualified because selected by the city. Her claim was not against the city but if allowed was collected by assessment. Officials acting really as an auditing board are not condemned because they have been selected by the municipality or other division against which the claim is made. If it were otherwise a great many bodies passing in a judicial capacity on claims from the Board of Claims down, would be disqualified.

In the case of Matter of City of Rochester v. Holden (224 N. Y. 386) there was not being audited a claim against the city which it had voluntarily assumed, but as a party litigant it was seeking under the right of eminent domain to deprive a citizen of his property, and we held that the pertinent statutes did not provide for such an impartial and disinterested tribunal as was required before the right could be exercised.

So our inquiry in the end reaches the decisive and substantial question on this appeal whether the legislature in sending relator's claim to the boards in question for action violated the constitutional provision securing to the Supreme Court "general jurisdiction in law and equity." We do not think it did.

As was said in De Hart v. Hatch (3 Hun, 375, 380), often quoted with approval: "The terms used (of the constitutional provision conferring jurisdiction upon the Supreme Court) are so comprehensive, that they include all cases of every description in law and equity, from the most important and complicated to the most simple and insignificant, and they imperatively and positively establish the court with that extended jurisdiction." Nevertheless there are very distinct limitations upon this jurisdiction. It does not extend to all kinds of claims. There are many familiar classes of these which may be sent to other tribunals for determination. The test and measure of its jurisdiction of a given claim or right is that the latter is litigable, that is, the subject of a suit or litigation in a court of

law. If it is thus litigable it cannot be withdrawn from the jurisdiction of the Supreme Court and sent to another tribunal.
91 If it is not litigable it may be thus sent elsewhere for decision. (People ex rel. Swift v. Luce, 204 N. Y. 378, 488.) In creating a new right such as is the present claim if the legislature sees fit to clothe it with the attributes of an ordinary cause of action the jurisdiction of the Supreme Court will undoubtedly attach and its hearing and determination cannot be assigned to some other tribunal. On the contrary it seems to be perfectly clear that in creating such a new right the legislature in the exercise of its discretion may refuse to give it the character of a litigable claim subject to the jurisdiction of the Supreme Court and may provide for its hearing and determination by some other tribunal. Having the power to determine whether any claim shall exist at all, it has the power within wide limits to determine where the claim, if created, shall be heard. That seems to us to be the present case. At common law the relator and her intestate would have had no claim for damages arising from the change of grade in the street in front of the premises in question. By section 873 of the Consolidation Act (Laws of 1882, ch. 410) it was in effect provided that there should be such a claim for damages. But at the same time the character of an ordinary cause of action was withheld from such claim and it was provided that it should be heard by the board of assessors and that the amount of any such award should be included in the expense of certain street proceedings. This status of the claim by one amendment after another has been preserved down to the present time and by such provisions the consideration of the claim has been withheld from the jurisdiction of the Supreme Court and the legislature has thus retained the power to forbid the right of review by such court by certiorari.

Especial emphasis is laid by the respondent upon the proposition that when this claim was created there was no provision preventing review by certiorari and that as the Supreme Court had general jurisdiction to review by that process the proceedings of subordinate tribunals, a jurisdiction attached to this claim which could not be annulled by a subsequent statute preventing such review. We think that this argument overlooks what is the fundamental consideration. If as we think the claim was of a nature which could be and was withheld from the jurisdiction of the Supreme Court we do not think that that court acquired an indestructible jurisdiction to review its determination practically on appeal by certiorari, but that the legislature had the right to declare that it should not be subject to such review. This proposition seems to us to be included in the one already discussed whether the right of review by appeal or otherwise could be cut off.

It seems to us that these views are sustained beyond serious debate by the case of People ex rel. Swift v. Luce (supra). That case involved the constitutionality of an act of the legislature abolishing the Court of Claims, terminating the terms of the judges thereof and creating a new tribunal to be known as the Board of Claims with

commissioners to be appointed by the governor. It was
92 claimed by the relators that the Court of Claims which it was thus sought to abolish was a constitutional court and its members constitutional judges and that, therefore, it was beyond the power of the legislature to abolish the former or terminate the terms of the latter. It was held otherwise, however, by a majority of the court, and writing therein Chief Judge Cullen laid down the principles pertinent to that case and applicable to the present proceeding that the jurisdiction of the Supreme Court embraces litigable claims which are made the subject of a suit or litigation; that in making the state subject to private claims the legislature had created a new class of rights and that it undoubtedly might have given these the form of ordinary causes of action which would be the subject of litigation and within the jurisdiction of the Supreme Court; that if it had done this it would have been unconstitutional to attempt to confer upon another tribunal than the Supreme Court the power to hear and determine such claims; that the legislature, however, had avoided this difficulty by not giving such form to such claims and by assigning them to another tribunal to be heard and determined; that such tribunal did not thereby become a constitutional court but rather "only an auditing board and a quasi-judicial body" and, necessarily involved, could lawfully pass upon the claims committed to its jurisdiction.

We see no difference in principle between the question there being decided and the present one. Here as there the legislature has created a new kind of claim. It has not given to it the attributes of a litigable cause of action to which the exclusive jurisdiction of the Supreme Court would attach. It has instead assigned it, as was said in the case just cited, to what is only an auditing and quasi-judicial body. Subject to the doctrine of vested rights under such a claim, it doubtless could have abolished the existence thereof altogether and certainly it had the power to determine by what tribunal and with what effect such a claim should be heard. (See, also, People ex rel. Hallock v. Hennessy, 205 N. Y. 301; 206 N. Y. 750; Bullock v. Cooley, 225 N. Y. 566.)

Therefore, we think that the questions certified to us must be answered in the negative, the orders appealed from reversed, with costs in all courts, and the motion to dismiss relator's proceeding granted.

Collin, Hogan, Pound, McLaughlin and Andrews JJ., concur; Elkus, J., not sitting.

Orders reversed, etc.

92½ [Endorsed:] Court of Appeals, State of New York. People etc. ex rel. Gertrude Crane, as administratrix etc., Relator-Respondent, vs. Louis H. Hahlo, et al. etc., William C. Ormond, et al. etc., and The City of New York, Defendants-Appellants. Certified Copy. Opinion of Court of Appeals.

93 Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Gertrude Crane, as Administratrix of the Goods, Chattels and Credits Which Were of George W. Sauer, Deceased, Relator Below and Plaintiff in Error,

against

LOUIS H. HAHLO, GEORGE P. NICHOLSON and JACOB A. CANTOR, as and Constituting the Board of Revision of Assessments of The City of New York; William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and Constituting the Board of Assessors of The City of New York, and The City of New York, Defendants Below and Defendants in Error.

Petition for Writ of Error.

To the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York:

The petition of Gertrude Crane as administratrix of the goods, chattels and credits which were of George W. Sauer, deceased, by John M. Harrington, her attorney, respectfully shows:

1. That in the record, proceedings, decision and final judgment of the Court of Appeals of the State of New York, the same being the highest court of said state in which a decision could be had, in the above mentioned cause, bearing date April 13, 1920, as amended by an order of said Court of Appeals bearing date June 8, 1920, and in the final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, bearing date June 21, 1920, making said order and judgment of said Court of Appeals the order and judgment of said Appellate Division of the Supreme Court of the State of New York, said last mentioned order having been rendered upon the remittitur from, and in obedience to the direction of, said Court of Appeals, manifest error has in-
94 tervened to the prejudice of the above named petitioner and plaintiff in error.

2. That as appears in said record and proceedings, there was drawn in question in said Court of Appeals by the above named petitioner and plaintiff in error herein (*a*) the validity of the following provision contained in section 944 of the Greater New York Charter, as amended by chapter 619 of the Laws of 1918 of the state of New York, namely, 'the confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained,' and the authority exercised thereunder, on the ground of their being repugnant to section 10 of Article I of the Constitution of the United States forbidding a state to pass any law impairing the obligation of contracts, (*b*) the validity of said pro-

vision contained in said section 944 of the Greater New York Charter, as amended as aforesaid, and the authority exercised thereunder, on the ground of their being repugnant to section 1 of the 14th Amendment of the Constitution of the United States providing that no state shall deprive any person of property, without due process of law, and (c) the validity of said provision contained in said section 944 of the Greater New York Charter, as amended as aforesaid, on the ground of their being repugnant to said section 1 of the 14th Amendment of the Constitution of the United States providing that no state shall deny to any person within its jurisdiction the equal protection of the laws.

3. That thereupon said Court of Appeals in said suit or proceeding and in its decision and judgment therein over-ruled said claim of the plaintiff in error herein and decided in favor of the validity of said provision of said last named statute and the authority exercised thereunder, to the prejudice of your petitioner, the plantiff in error, all of which will more in detail appear from the record herein and assignment of errors herewith presented.

4. That said record and proceedings of said Court of Appeals have been remitted into the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and now remain in the said Appellate Division of the Supreme Court before the justices thereof.

Wherefore, the petitioner prays that a writ of error from the Supreme Court of the United States to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, be allowed and that a transcript of record, papers and proceedings upon which said judgment, and order were rendered, duly authenticated, be order- sent to the Supreme Court of the United States at Washington, D. C., as provided by law, and for the usual citation, to the end that, the record and proceedings being inspected, the Supreme Court of the United States may cause further to be done therein, to correct all errors what of right and according to law and the Constitution of the United States ought to be done; and your petitioner will ever pray.

Dated, New York, June 23, 1920.

GERTRUDE CRANE,
As Administratrix of the Goods, Chattels and Credits Which Were of George W. Sauer, Deceased, Petitioner and Plaintiff in Error.
JOHN M. HARRINGTON,
Attorney for Petitioner and Plaintiff in Error.

154 Nassau Street, Borough of Manhattan, New York City, New York.

95½ [Endorsed:] Court of Appeals of the State of New York. The People, etc. ex rel. Gertrude Crane as administratrix, etc. of George W. Sauer, dec'd, plaintiff in error, vs. Louis H. Hahlo et al., etc.; William C. Ormondo et al., etc., and The City of New York, defendants in error. Petition for writ of error. John M. Harrington, attorney for plaintiff in error, 154 Nassau street, Borough of Manhattan, New York City, New York. Read on application for writ of error. Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York.

96 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Gertrude Crane, as Administratrix of the Goods, Chattels, and Credits Which Were of George W. Sauer, Deceased, Relator Below and Plaintiff in Error,

against

LOUIS H. HAHLO, GEORGE P. NICHOLSON, and JACOB A. CANTOR, as and Constituting the Board of Revision of Assessments of the City of New York, and William C. Ormond, Andrew T. Sullivan, and Maurice Simmons, as and Constituting the Board of Assessors of the City of New York, and The City of New York, Defendants Below and Defendants in Error.

Assignment of Errors.

And now comes Gertrude Crane as administratrix of the goods, chattels and credits which were of George W. Sauer, deceased, plaintiff in error and relator below, by John M. Harrington, her attorney, and, in connection with her petition for a writ of error, shows that, in the record, proceedings, decision and final judgment of the Court of Appeals of the State of New York and the final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, rendered in the above mentioned cause upon the remittitur from, and in obedience to the direction of, said Court of Appeals manifest error has intervened to the prejudice of the above named petitioner and plaintiff in error in this, to-wit:

1. By the record aforesaid, it appears that the aforesaid judgment was given by the Court of Appeals of the State of New York
97 against the relator below and plaintiff in error and in favor of the defendants below and defendants in error; whereas, by the law of the land, the said judgment should have been given in favor of the relator below and against the defendants below.

2. The said Court of Appeals erred in holding and deciding that the proceeding instituted in behalf of the relator below should be dismissed.

3. The said Court of Appeals erred in holding and deciding that the following provision contained in section 944 of the Greater New York Charter, as amended by chapter 619 of the Laws of 1918 of the State of New York, namely:

"The confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained."

and the authority exercised thereunder, are valid as against the rights and remedies of the plaintiff in error and not repugnant to the provision of section 10 of Article I of the Constitution of the United States forbidding a state to pass any law impairing the obligation of contracts; whereas, in fact and in law, said provision, last hereinabove quoted, of said act or statute is repugnant to the provision of said section 10 of Article I of the Constitution of the United States as against the rights and remedies of the plaintiff in error, in that said provision impairs the obligation of the contract set forth and contained in the statutes, constitution and laws of the State of New York, as follows: At the time of the enactment of chapter 576 of the Laws of 1887 of the state of New York and at the time of the erection of the 155th Street viaduct pursuant to the authority conferred upon the municipality of the city of New York by the
98 last named statute section 873 of chapter 410 of the Laws of 1882 of the State of New York, commonly known as the New York City Consolidation Act, was in force; upon the erection of said viaduct, by virtue of the command of said last named section, it became the duty of the board of assessors of the city of New York to comply with the command of said last named statute and in that behalf to estimate the loss and damage that George W. Sauer, the intestate of the plaintiff in error, sustained by reason of the erection of said viaduct in respect of lands and premises abutting upon 155th Street and 8th Avenue then owned by him and to make to him a just and equitable award of the amount of such loss and damage; at the time said George W. Sauer sustained damage by the erection of said viaduct section 876 of said chapter 410 of the Laws of 1882 of the Laws of the State of New York imposed upon the former municipal corporation then known as the mayor, aldermen and commonalty of the city of New York, whose duties and obligations have devolved to and have become operative upon the defendant in error, The City of New York, the obligation to pay to the persons entitled thereunto the amount of awards made by the board of assessors in their favor; at the time the intestate of the plaintiff in error sustained damage in respect of his said premises by reason of the erection of said viaduct the law of the State of New York by virtue of the common law of the State of New York, as continued in force by the provisions of Article 7 of title 2 of chapter 16, including sections 2120 and 2140, of the Code of Civil Procedure of the State of New York, as enacted by chapter 448 of the Laws of 1876, afforded to him, and after his death to the plaintiff in error, the right to secure
99 a review in the Supreme Court of New York, pursuant to a common law writ of certiorari, of any determination that might be made by such board of assessors or by any other inferior tribunal in the premises, in respect of questions, among others, as to whether, in making the determination assessing the amount of damages sustained, any rule of law, affecting the rights of the parties thereto, had been violated to his prejudice and, upon such review

on certiorari, the Supreme Court of the State of New York also had jurisdiction to determine as to whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of the facts necessary to be proved to support the determination under review, that the verdict of a jury, affirming the existence thereof, rendered in an action in said Supreme Court of New York, would be set aside, as against the weight of evidence; at all the times herein mentioned the Supreme Court of New York was, under the Constitution of the State of New York, a court of general jurisdiction in law and equity; at all the times herein mentioned, by virtue of a provision now contained in section 1 of Article 6 of the Constitution of the State of New York, the general jurisdiction of said Supreme Court of the State of New York was not subject to be limited or restricted by any legislative enactment; and said Supreme Court of New York then had power and jurisdiction, by mandamus and otherwise, at the instance of said George W. Sauer and after his death at the instance of the plaintiff in error, to enforce obedience to and compliance with any determination that might be rendered by the court in any such certiorari proceeding. Said provisions of said section 944 of the Greater New York Charter, as amended as aforesaid, hereinabove quoted, substantially impairs and lessens the value of said contract thus created, in that said statute assumes materially to abridge the remedy for enforcing said contract by withdraw-
100 ing from the plaintiff in error the right to review in said Supreme Court of New York, pursuant to a common law writ of certiorari or otherwise, the determinations of the defendant board of assessors of The City of New York and the defendant board of revision of assessments of The City of New York in respect of an obligation that arose in favor of the intestate of the plaintiff in error and against the city of New York when that remedy subsisted as aforesaid and does not supply an alternative remedy equally adequate and efficacious, but, on the contrary, without expressly requiring any notice to or a hearing or an opportunity to be heard on the part of the plaintiff in error before such board of revision of assessments, said provision of said act, hereinabove quoted, assumes to render the confirmation of any award by the board of revision of assessments of The City of New York, consisting of the comptroller, the corporation counsel and the president of the department of taxes and assessments of The City of New York, final and conclusive upon all persons in respect of the amount of damage sustained.

4. The said Court of Appeals erred in holding and deciding that said provision contained in section 944 of the Greater New York Charter, as amended as aforesaid, and the authority exercised thereunder, are valid as against the rights and remedies of the plaintiff in error and not repugnant to section 1 of the 14th Amendment of the Constitution of the United States, providing that no state shall deprive any person of property, without due process of law; whereas, in fact and in law, said provision of said statute is repugnant to the last mentioned constitutional provision and does assume to
100½ deprive the plaintiff in error of property without due process of law, in that, as hereinabove more fully set forth, by the

law of the state of New York, subsisting when the obligation on the part of the city of New York to compensate the late George W. Sauer, the predecessor in interest of the plaintiff in error, for the damages resulting from the erection of the said viaduct was created, the remedy of said George W. Sauer and after his death the remedy of the plaintiff in error embraced the right to invoke the jurisdiction of said Supreme Court of the state of New York to review, pursuant to a common law writ of certiorari, any determination that might be made by said board of assessors or by any other inferior tribunal in the premises in respect of the amount of damages sustained and to invoke the jurisdiction of said Supreme Court of the State of New York, by mandamus and otherwise, to enforce compliance by said board of assessors or by any other inferior tribunal with any determination that might be rendered by said Supreme Court of New York in any such certiorari proceeding. Said provision of said statute, hereinabove quoted, substantially impairs and lessens the value of the property right that arose on or before October 2, 1893, in favor of said George W. Sauer and against the mayor, aldermen and commonalty of the city of New York, the predecessor of the defendant in error, The City of New York, by reason of the damage sustained in the premises at a time when the aforesaid statutory remedy was afforded therefor, in that said statute, as amended as aforesaid, assumes to withdraw from the plaintiff in error the right to review in said Supreme Court of the State of New York, by certiorari or otherwise, the determinations of said defendant boards in respect of the value of the property right consisting of the chose in action that arose as aforesaid when that remedy subsisted, and does not
101 supply an alternative remedy equally adequate and efficacious, but, on the contrary, without expressly requiring any notice to or a hearing or an opportunity to be heard on the part of the plaintiff in error before such board of revision of assessments, said provision of said act, hereinabove quoted, assumes to render the confirmation of any award by the board of revision of assessments of The City of New York, consisting of the comptroller, the corporation counsel and the president of the department of taxes and assessments of The City of New York, final and conclusive upon all persons in respect of the amount of damage sustained.

5. The said Court of Appeals erred in holding and deciding that said provision contained in section 944 of the Greater New York Charter, as amended as aforesaid, and the authority exercised thereunder, are valid as against the rights and remedies of the plaintiff in error and not repugnant to section 1 of the 14th Amendment of the Constitution of the United States providing that no state shall deny to any person within its jurisdiction the equal protection of the laws; whereas, in fact and in law, said statute, as amended as aforesaid, is repugnant to said last named provision of said 14th Amendment, in that, said statute assumes to substitute, in place of a determination of an impartial tribunal of general jurisdiction in law and equity, namely, the Supreme Court of the State of New York, to be rendered after a judicial hearing pursuant to a common

law writ of certiorari, a final determination of an inferior tribunal, namely, the board of revision of assessments of The City of New York, consisting of the comptroller, the corporation counsel
102 and the president of the department of taxes and assessments of The City of New York, authorized to be made by the last named board without requiring as matter of right notice to and a hearing or an opportunity to be heard on the part of the plaintiff in error, notwithstanding that the defendant in error, The City of New York, is obligated by statute to pay any award that may be made by said board of assessors and confirmed by said board of revision of assessments, whether, in the discretion vested in the board of estimate and apportionment of said city by the provisions of section 576 of the Laws of 1887 and of chapter 979 of the Laws of 1895 of the State of New York, the amount thereof is to be raised, in whole or in part, by taxation on the real and personal property liable to taxation in the city of New York or is to be raised, in whole or in part, by assessment upon property deemed to be benefited by the improvement, and notwithstanding that under the law of the State of New York neither of said defendant boards is a court, that none of the members of said board of assessors is required by law to be a lawyer and that the only member of said board of revision of assessments that is required by law to be a lawyer is the corporation counsel of The City of New York, who is also under the law of the State of New York the legal adviser of each of said defendant boards.

Wherefore, said Gertrude Crane as administratrix of the goods, chattels and credits which were of George W. Sauer, deceased, relator below and plaintiff in error, prays that said judgment of the said Court of Appeals of the State of New York be reversed, annulled and altogether held for nothing and that she as administratrix as
103 aforesaid may be restored to all things which she as administratrix has lost by occasion of the said judgment, etc., and that she as administratrix aforesaid may have such other and further relief according to law as to the Court may seem just and proper.

Dated, New York, June 23, 1920.

JOHN M. HARRINGTON,
Attorney for Plaintiff in Error, 154 Nassau Street, Borough of Manhattan, New York City, New York.

103½ [Endorsed:] Supreme Court of the United States. The People, etc., ex rel. Gertrude Crane, as administratrix, etc., of George W. Sauer, dec'd, Plaintiff in Error, vs. Louis H. Hahlo et al., etc., William C. Ormond et al., etc., and The City of New York, Defendants in Error. Assignment of Errors. John M. Harrington, Attorney for Plaintiff in Error, 154 Nassau Street, Borough of Manhattan, New York City, New York. Read on application for writ of error. Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York.

104 STATE OF NEW YORK:

Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Gertrude Crane, as Administratrix of the Goods, Chattels and Credits Which Were of George W. Sauer, Deceased, Relator Below and Plaintiff in Error,

against

LOUIS H. HAHLO, GEORGE P. NICHOLSON and JACOB A. CANTOR, as and Constituting the Board of Revision of Assessments of The City of New York, William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and Constituting the Board of Assessors of The City of New York, and The City of New York, Defendants Below and Defendants in Error.

Order Allowing Writ of Error.

On reading the petition of Gertrude Crane as administratrix of the goods, chattels and credits which were of George W. Sauer, deceased, in the above entitled suit for writ of error and the assignment of errors filed therewith, and upon due consideration of the record in said cause;

It is ordered that a writ of error be allowed from the Supreme Court of the United States to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said petitioner and plaintiff in error give security in the sum of five hundred dollars that the said plaintiff in error shall prosecute said writ of error to effect and, if said plaintiff in error fail to make her plea good,
105 shall answer to the defendants in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said petitioner, plaintiff in error, now presenting a bond in the sum of five hundred ($500) dollars, with the United States Fidelity & Guaranty Company, of 47 Cedar Street, Borough of Manhattan, New York City, New York, as surety, it is ordered that the same be and hereby is duly approved.

In witness whereof, I have hereunto set my hand this 28 day of June, 1920.

[Seal of State of New York Court of Appeals.]

FRANK H. HISCOCK,
Chief Judge of the Court of Appeals of the State of New York.

105½ [Endorsed:] State of New York, Court of Appeals, The People etc. ex rel. Gertrude Crane as administratrix etc., of George W. Sauer, dec'd., relator below and plaintiff in error, vs. Louis H. Hahlo et al. etc., William C. Ormond et al. etc., and The City of New York, defendants below and defendants in error. Order allowing writ of error. John M. Harrington, attorney for plaintiff in error, 154 Nassau Street, Borough of Manhattan, New York City, New York.

106 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the Court of Appeals of the State of New York, wherein final judgment upon return from the Supreme Court of the State of New York was rendered on the 13th day of April, 1920, that being the highest court of law and equity of the said state in which a decision could be had in the suit or proceeding between Gertrude Crane as administratrix of the goods, chattels and credits which were of George W. Sauer, deceased, relator below and plaintiff in error, and Louis H. Hahlo, George P. Nicholson and Jacob A. Cantor, as and constituting the Board of Revision of Assessments of The City of New York, William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and constituting the Board of Assessors of The City of New York, and The City of New York, defendants below and defendants in error, and which judgment, as amended by an order of said Court of Appeals bearing date June 8, 1920, has been remitted into the Appellate Division of said Supreme Court of New York, First Judicial Department, for execution and is now before you or some of you in said Court; and whereas said order and judgment of said Court of Appeals has been made the order and judgment of the Supreme Court of New York by an order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, bearing date June 21, 1920, and filed and entered in the office of the clerk of said Appellate Division

107 on the last named day; and whereas there was drawn in question in said Court of Appeals by said relator and plaintiff in error the valid-ty of a statute of, or an authority exercised under, said State of New York, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity; and whereas a manifest error hath happened to the great damage of the said Gertrude Crane as administratrix of the goods, chattels and credits which were of George W. Sauer, deceased, as appears by her petition and assignment of errors, and whereas we are willing that such error, if any hath been, should be duly correct, and full and speedy justice done to the party aforesaid in this behalf, we do command you, if judgment be given therein, that under your seal, distinctly and openly, you send the record and proceedings in said cause with all things concerning the same, to the

Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, in the District of Columbia, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 28 day of June, in the year of our Lord, one thousand nine hundred and twenty.

[Seal, District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, Jr.,
Clerk of the District Court of the United States for the Southern District of New York, in the Second Circuit.

Allowed by
FRANK H. HISCOCK,
Chief Judge of the Court of Appeals of the State of New York.

107½ [Endorsed:] M. 6-35. Supreme Court of the United States. The People etc. ex rel. Gertrude Crane as administratrix etc., of George W. Sauer, decd., relator below and plaintiff in error, vs. Louis H. Hahlo et al. etc., Wiliam C. Ormond et al. etc., and The City of New York, defendants below and defendants in error. Writ of error. John M. Harrington, attorney for plaintiff in error, 154 Nassau Street, Borough of Manhattan, New York City, New York.

108 UNITED STATES OF AMERICA, *ss.:*

To Louis H. Hahlo, George P. Nicholson and Jacob A. Cantor, as and constituting the Board of Revision of Assessments of The City of New York, William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and constituting the Board of Assessors of The City of New York, and The City of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a Writ of Error, filed in the office of the clerk of the Appellate Division of the Supreme Court of the State of New York First Judicial Department, wherein Gertrude Crane as administratrix of the goods, chattels and credits which were of George W. Sauer, deceased, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, this 28 day of June, in the year of our Lord, One Thousand Nine Hundred and Twenty.

[Seal Court of Appeals, State of New York.]

FRANK H. HISCOCK,
Chief Judge of the Court of Appeals of the State of New York.

108½ [Endorsed:] Supreme Court of the United States. The People etc. ex rel. Gertrude Crane as administratrix etc., of George W. Sauer, dec'd., plaintiff-below and plaintiff in error against Louis H. Hahlo et al. etc., William C. Ormond et al. etc. and The City of New York, defendants below and defendants in error. Citation. John M. Harrington, Attorney for plaintiff in error, 154 Nassau Street, Borough of Manhattan, New York City, New York. C. J. N. Personal service of the within citation is hereby admitted and acknowledged this 30 day of June, 1920. John P. O'Brien Corporation Counsel, Attorney for defendants in error.

109 Know all men by these presents:

That we, Gertrude Crane individually and as administratrix of the goods, chattels and credits which were of George W. Sauer, deceased of the Borough of The Bronx, New York City, N. Y., as principal and the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 47 Cedar Street, in the City of New York, as surety, are held and firmly bound unto Louis H. Hahlo, George P. Nicholson and Jacob A. Cantor, as and constituting the Board of Revision of Assessments of The City of New York, William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and constituting the Board of Assessors of The City of New York, and The City of New York, in the full and just sum of Five Hundred ($500.00) Dollars, to be paid to the said Louis H. Hahlo, George P. Nicholson and Jacob A. Cantor as and constituting the Board of Revision of Assessments of The City of New York, William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and constituting the Board of Assessors of The City of New York, and The City of New York, their attorneys, successors and assigns; to which payment well and truly to be made, the said principal binds herself, her heirs, executors and administrators, and the said surety binds itself, its successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of June, in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately at a Court of Appeals for the State of New York held at the city of Albany on the 13th day of April, 1920, in a suit or proceeding depending in the Supreme Court of the State of New York, between the above named Gertrude Crane, as admin-
110 istratrix of the goods, chattels and credits which were of George W. Sauer, deceased, as relator and Louis H. Hahlo,

George P. Nicholson and Jacob A. Cantor, as and constituting the Board of Revision of Assessments of The City of New York, William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and constituting the Board of Assessors of The City of New York, and The City of New York, as defendants, a judgment upon return from said Supreme Court was rendered against the said relator and in favor of said defendants reversing certain order of said Supreme Court, and dismissing the proceedings instituted by the relator, which said judgment was amended by an order of said Court of Appeals bearing date June 8th, 1920, and the said order and judgment of the Court of Appeals as so amended, having been made the judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, by an order of said Appellate Division of said Supreme Court of the State of New York, bearing date June 21st, 1920, filed and entered in the office of the Clerk of said Appellate Division on said June 21st, 1920; and whereas the said relator seeks to prosecute a writ of error to reverse the order and judgment in the aforesaid suit, and to obtain a citation directed to the said defendants citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Gertrude Crane, as administratrix of the goods, chattels and credits which were of George W. Sauer, deceased, shall prosecute said writ of error to effect, and answer all damages and costs if she fail to make good her plea, then the above obligation to be void; otherwise to remain in full force and virtue.

111 Sealed and Delivered in presence of:

GERTRUDE CRANE. [L. S.]
Individually and as Administratrix of the Goods, Chattels and Credits Which Were of George W. Sauer, Deceased.

UNITED STATES FIDELITY AND GUARANTY COMPANY.
By S. FRANK HEDGES,
[SEAL.] *Attorney-in-Fact.*

Attes.:
WILLIAM H. ESTWICK,
Attorney-in-Fact.

STATE OF NEW YORK,
County of New York, ss:

On this 25th day of June, 1920, before me personally appeared Gertrude Crane to me known and known to me to be the person described in and who executed the foregoing instrument and she duly acknowledged to me that she executed the same.

[SEAL.] J. W. MILLER,
Notary Public.

New York County No. 880.
Register No. 2328.
Certificate filed in Kings County No. 138.
Register No. 2173.
Bronx County No. 25, Register No. 2266.
Queens County No. 1975.
Putnam, Westchester, Orange, Suffolk, Nassau, Richmond, Rockland.

Term expires March 30th, 1922.

112 *Affidavit, Acknowledgment and Justification by the United States Fidelity and Guaranty Company.*

Contract, Fidelity, Judicial, Casualty.

STATE OF NEW YORK,
County of New York, ss:

Before me personally came S. Frank Hedges, known to me to be an Attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Gertrude Crane individually and as Administratrix of the goods, chattels and credits which were of George W. Sauer, deceased, as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Attorney-in-fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Gertrude Crane, individually and as Administratrix of the goods, chattels and credits which were of George W. Sauer, deceased is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as such Attorney-in-fact of said Company; and that he is acquainted with William H. Estwick and knows him to be Attorney-in-fact of said Company; and that the signature of said William H. Estwick subscribed to said bond is the genuine handwriting of said William H. Estwick and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

[SEAL.] S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my presence this 23rd day of June, 1920.

J. W. MILLER,
[SEAL.] *Notary Public, New York County, No.* 380.

Register No. 2328.
Certificate filed in Kings County, No. 138, Register No. 2173.
Bronx County No. 25, Register No. 2266.
Queens County No. 1975.
Putnam, Westchester, Orange, Suffolk, Nassau, Richmond, Rockland.
Term Expires March 30th, 1922.

112½ [Endorsed:] Supreme Court of the United States. Gertrude Crane individually and as administratrix, etc., of George W. Sauer, decd., principal, United States Fidelity and Guaranty Company, surety, to Louis H. Hahlo et al., etc., William C. Ormond et al., etc., and The City of New York. (Copy.) Bond on writ of error. John M. Harrington, attorney for plaintiff in error, 154 Nassau street, Borough of Manhattan, New York City, New York. The within bond is hereby approved as to form and as to sufficiency of the surety this 28 day of June, 1920. Frank H. Hiscock, Chief Judge of the Court of Appeals of the state of New York. Filed Jul. 1, 1920.

113 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Gertrude Crane, as Administratrix of the Goods, Chattels, and Credits Which Were of George W. Sauer, Deceased, Plaintiff in Error,

vs.

LOUIS H. HAHLO et al., etc., WILLIAM C. ORMOND et al., etc., and THE CITY OF NEW YORK, Defendants in Error.

Pursuant to the provisions of Subd. 1. of Rule 8 of the Rules of the Supreme Court of the United States, as amended: it is hereby stipulated by and between John M. Harrington, attorney for plaintiff in error, and John P. O'Brien, corporation counsel, attorney for defendants in error, in the above entitled cause, that the following portions of the record therein shall constitute the transcript of record on writ of error from the Supreme Court of the United State to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, to-wit:

1. Notice of appeal to Appellate Division; 2. Order dated August 9, 1919; 3. Notice of motion; 4. Writ of certio-ari; 5. Order allowing writ of certiorari; 6. Affidavit of John M. Harrington; 7. Affidavit of Gertrude Sprotte; 8. Exhibit I attached to affidavit of John M. Harrington; 9. The hypothetical question beginning at line 3

fol. 214 and ending at line 11 of fol. 235 of the printed record in said cause in the state courts; said hypothetical question having been incorporated by reference as a part of paragraph 26 of said affidavit of said John M. Harrington; 10. Exhibit 8 annexed to the
114 said affidavit of John M. Harrington; 11. Exhibit 9 annexed to the said affidavit of John M. Harrington; 12. Opinion of Mr. Justice Luce; 13. Waiver of certification dated September 30, 1919; 14. Notice of appeal to the Court of Appeals; 15. Order of affirmance; 16. Order granting leave to appeal to the Court of Appeals; 17. Opinion of Appellate Division on motion for leave to appeal to the Court of Appeals; 18. Affidavit of no opinion on affirmance of order; 19. Waiver of certification bearing date January 10, 1920; 20. Judgment of Court of Appeals dated April 13, 1920, contained in remittitur from Court of Appeals; 21. Order of Court of Appeals bearing date June 8, 1920, amending remittitur and judgment of Court of Appeals; 22. Order of Appellate Division of the Supreme Court of the State of New York, First Judicial Department dated June 21, 1920, making the judgment of the Court of Appeals the judgment of the first named court; 23. Certified copy of the opinion of Court of Appeals; 24. Petition for writ of error; 25. Assignment of errors; 26. Order allowing writ of error; 27. Writ of error; 28. Citation; and 29. Bond on writ of error.

It is further stipulated that the clerk of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, be and he hereby is requested to omit from the return to said writ of error, as unnecessary to be printed in order properly to present to the Supreme Court of the United States the questions involved in the above entitled cause, the following described exhibits annexed to the said affidavit of John M. Harrington, namely, Exhibit 2, Exhibit 3, Exhibit 4, Exhibit 5, Exhibit 6, excepting so much of said Exhibit 6 as is embraced within the hypothetical question
115 referred to in paragraph 26 of said affidavit, and Exhibit 7.

Dated, New York, July 6, 1920.

JOHN M. HARRINGTON,
Attorney for Plaintiff in Error.
JOHN P. O'BRIEN,
Corporation Counsel Attorney
for Defendants in Error.
C. J. N.

116 UNITED STATES OF AMERICA,

Appellate Division of the Supreme Court, First Judicial Department.
Clerk's Office.

STATE OF NEW YORK,
County of New York, ss:

I, Alfred Wagstaff, clerk of the Appellate Division of the Supreme Court of the State of New York, in the First Judicial Department, by virtue of the foregoing writ of error and in obedience

thereto, do hereby certify that the foregoing pages numbered 1 to 115, inclusive, contain a true and complete transcript of the portions of the record and proceedings, as agreed to by the attorneys for the respective parties by written stipulation on file in my office bearing date July 6, 1920, had in the case of The People of the State of New York on the relation of Gertrude Crane as administratrix of the goods, chattels and credits which were of George W. Sauer, deceased, relator and respondent in the Court of Appeals of the State of New York and plaintiff in error in the Supreme Court of the United States, against Louis H. Hahlo, George P. Nicholson and Jacob A. Cantor, as and constituting the Board of Revision of Assessments of The City of New York, William C. Ormond, Andrew T. Sullivan and Maurice Simmons, as and constituting the Board of Assessors of The City of New York, and The City of New York, defendants and appellants in said Court of Appeals and defendants in error in the Supreme Court of the United States, and that the same, together with the annexed certified copy of the opinion of said Court of Appeals in said cause, the original petition for said writ of error, assignment of errors, order allowing writ of error, citation to the defendants in error, writ of error, a copy of the bond on writ of error and said original stipulation bearing date July 6, 1920, con-
117 stitute the return to said writ of error.

In witness whereof, I have caused the seal of said court to be hereunto affixed at the court house of the Appellate Division of the Supreme Court, First Judicial Department, in the county of New York, and have hereunto set my hand this 9th day of July, 1920.

[Seal of the Supreme Court Appellate Division, First Department.]

ALFRED WAGSTAFF,
Clerk.

117½ [Endorsed:] United States of America. Appellate Division of the Supreme Court, First Judicial Department, Clerk's office. The People of the State of New York on the relation of Gertrude Crane as administratrix of the goods, chattels and credits which were of George W. Sauer, deceased, plaintiff in error, vs. Louis H. Hahlo et al. etc., William C. Ormond et al. etc., and The City of New York, defendants in error. Return to writ of error.

Endorsed on cover: File No. 27,807. New York Supreme Court, Appellate Division, First Judicial Department. Term No. 450. Gertrude Crane, as administratrix &c., of George W. Sauer, deceased, plaintiff in error, vs. Louis H. Hahlo, George P. Nicholson, and Jacob A. Cantor, as and constituting the Board of Revision of Assessments of the City of New York et al. Filed July 15th, 1920. File No. 27,807.

Supreme Court of the United States

No. 107 October Term, 1921

GERTRUDE CRANE, as Administratrix of the Goods, Chattels and Credits which were of GEORGE W. SAUER, deceased
Plaintiff-in-Error

against

LOUIS H. HAHLO, GEORGE P. NICHOLSON and JACOB A. CANTOR, as and constituting the Board of Revision of Assessments of the City of New York, and WILLIAM C. ORMOND, ANDREW T. SULLIVAN and MORRIS SIMMONS as and constituting the Board of Assessors of the City of New York, and THE CITY OF NEW YORK

Brief For Plaintiff-in-Error

JOHN M. HARRINGTON
ARCHIBALD R. WATSON
HERBERT H. GIBBS
Of Counsel for Plaintiff-in-Error

SUBJECT INDEX

List of Cases Cited

Constitutions and Statutes Cited

Supreme Court of the United States

GERTRUDE CRANE, as administratrix of the goods, chattels and credits which were of George W. Sauer, deceased,
Plaintiff-in-error,
against
LOUIS H. HAHLO, GEORGE P. NICHOLSON and JACOB A. CANTOR, as and constituting the Board of Revision of Assessments of The City of New York, and WILLIAM C. ORMOND, ANDREW T. SULLIVAN and MAURICE SIMMONS, as and constituting the Board of Assessors of The City of New York, and The City of New York.

No. 107
October Term
1921

BRIEF FOR PLAINTIFF IN ERROR

This is a writ of error to the Appellate Division of the Supreme Court of the state of New York, First Judicial Department, to review a decision and final judgment rendered by the Court of Appeals of the State of New York in favor of the validity of a statute of the state of New York and

the authority exercised thereunder, the validity whereof was drawn in question upon the ground of their being repugnant to the constitution of the United States, and the final order of the Appellate Division of the Supreme Court of the state of New York, First Judicial Department, rendered upon the remittitur from and in obedience to the direction of the said Court of Appeals, whereby prior orders of said Appellate Division and of a special term of said Supreme Court were reversed and the motion of the defendant The City of New York to dismiss the proceeding was granted (T. R. 60, 38-44, 35). The proceeding thus dismissed was instituted by the issuance of a common law writ of *certiorari* to review in said Appellate Division determinations of the defendant board of assessors of the city of New York and of the defendant board of revision of assessments of said city, resulting in an award of damage caused by a change of grade of 155th street in said city brought about by the erection of the 155th street viaduct. (T. R. 4-6, 28).

The opinion of the Court of Appeals is reported in 228 N. Y., 309 (see also T. R. 46-51). The opinion of the Special Term of the Supreme Court of New York and a memorandum by the Appellate Division of the Supreme Court are printed in the Transcript of Record (T. R. 33, 37).

Statement of the Case

George W. Sauer, the original plaintiff in the case of *Sauer v. New York*, 206 U. S., 536, was the intestate of the plaintiff-in-error in the case at bar.

After this court's decision in *Sauer v. New York*, *supra*, and on July 11, 1917, the Court of Appeals of New York held in *People ex rel. Cauer v. Ormond*, 221 N. Y., 283, that the erection of the 155th street viaduct in the city of New York, which was completed on October 2, 1893, constituted a change of grade of the street and that the damage resulting therefrom was recoverable pursuant to the provisions of section 873 of Chapter 410 of the Laws of New York of 1882 (the *New York City Consolidation Act*), which statute made it the duty of the board of assessors of the city of New York where the grade of a street "shall be changed" to estimate the damage suffered by abutting owners and to make awards therefor; and, on August 31, 1918, said board of assessors made an award to the plaintiff-in-error in the principal sum of $42,500 for the damage sustained by the erection of said viaduct.

As hereinafter more particularly stated, when the damage was wrought by the erection of the 155th street viaduct, the intestate of the plaintiff-in-error, as a part of his remedy for the enforcement of his claim for damages, possessed the right to invoke the jurisdiction of the Supreme Court of New York, a court of general jurisdiction, to review, pursuant to a common-law writ of *certiorari*, any determination of the board of assessors upon the question, among others, as to whether in making an award of damage any rule of law had been violated to his prejudice.

On May 11, 1918, the legislature of New York enacted Chapter 619 of the Laws of 1918, whereby several sections of the *Greater New York*

Charter (Laws of 1897, Chap. 378, as reenacted by Laws of 1901, Chap. 466) were amended. By that amending statute of 1918, §944 of that charter was amended so as to provide, so far as here material, as follows:

> "§944. The comptroller, corporation counsel and president of the department of taxes and assessments shall constitute the board of revision of assessments. * * * said board shall have power to consider, on the merits, all objections made to any such assessment, or to any award for damage made by the board of assessors, and to subpoena and examine witnesses in relation thereto, and to confirm said assessment or award, or to refer the same back to the board of assessors for revisal and correction in such respects as it may determine * * *. The confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained."

Briefly stated, the question here involved is as to whether or not the provision of the last above quoted sentence of New York Laws of 1918, Chap. 619, to wit:

> "The confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained."

is unconstitutional and void, *in so far as that provision is applicable to a case where the change of grade damage accrued prior to the passage of that act* and at a time when the property owner affected possessed, under the law of the state of New York then in force, as a part of his remedy

for the enforcement of his claim for damages, the right to invoke the jurisdiction of the Supreme Court of New York, a court of general jurisdiction under the state constitution, to obtain, pursuant to a common-law writ of *certiorari*, a hearing upon the merits in said Supreme Court upon the question, among others, as to whether in making an award any rule of law had been violated to the prejudice of the damaged property owner.

In other words, the question is as to whether a state legislature may, without violating the Federal Constitution, take away a property owner's right, theretofore possessed, to a hearing in a court of general jurisdiction in respect of the principles adopted in determining the amount of damage sustained by reason of a change of street grade and constitute an inferior tribunal, composed of three city officials, as the final arbiter, in respect of both the facts and the law, of a controversy, already existing between the property owner and the municipality and involving the value of a property right that had already vested in favor of the property owner and a corresponding contractual obligation that had been imposed upon the municipality by the operation of a statute in force when the property right arose and the obligation was created.

The essential facts are as follows:

In 1886, the late George W. Sauer, the intestate of the plaintiff-in-error, purchased certain premises at the southwest corner of 155th street and 8th avenue in the city of New York, having a frontage of 175 feet on 155th street and owned the same continuously thereafter until after the

erection of the 155th street viaduct (T. R. 12). At that time there were standing on said premises certain buildings known as "Atalanta Casino," which were used as a place of public resort, recreation and entertainment (*id.*).

On June 15, 1887, New York Laws of 1887, Chapter 576, providing for the construction of the 155th Street viaduct was enacted. Section 1 of that statute provided as follows:

> "SECTION 1. The commissioner of public works in the city of New York is hereby authorized and empowered to improve and regulate the use of One Hundred and Fifty-fifth street, in said city, and for that purpose to erect and construct over and along said street from the easterly line of St. Nicholas place to Macomb's Dam bridge, an elevated iron roadway, viaduct or bridge, with the necessary abutments, arches over intersecting avenues and approaches thereto for the passage of animals, persons, vehicles and traffic, provided that nothing shall be done under this act until the approval of the board of estimate and apportionment shall have been given."

Section 3 of Laws of 1887, Chapter 576, was amended by Laws of 1895, Chapter 979, so as to read as follows:

> "§3. The board of estimate and apportionment of the city of New York may, on the requisition of the said commissioner of public works, specify the amount required for the work and materials of constructing said improvement, raise such amount by taxation on the real and personal property liable to taxation in said city. Or if the said board of estimate and apportionment shall, in their discretion, de-

termine that the amount so required or a sum not exceeding one-half of said amount shall be raised by assessment upon property deemed to be benefited by said improvement; then such amount so determined by them shall be assessed by the board of assessors upon the property benefited, and all provisions of law relative to the collection of assessments for local improvements shall apply to such assessments. The said board of estimate and apportionment of the city of New York is hereby authorized and empowered in its discretion to reconsider the question as to whether or not the amount required for said improvement or a sum not exceeding one-half the amount shall be raised by assessment upon property deemed to be benefited by said improvement, and may make such determination as to the amount of said assessment and as to the property deemed to be benefited by said improvement as in its judgment and discretion is deemed proper notwithstanding any action of said board which may have heretofore been had fixing the amount of the assessment to be paid by property benefited or fixing the area of said benefited property. And upon such further determination of amount of assessment and as to the property deemed to be benefited by said improvement, then said amount so determined by them shall be assessed by the board of assessors upon the property benefited and all the provisions of law relative to the collection of assessments for local improvement shall apply to such assessments. The comptroller of said city shall pay from such money upon vouchers certified by said commissioner of public works in the form to be approved by the said comptroller, the cost of the materials, labor and services required in the construction of said improvement and the necessary expenses connected therewith."

Pursuant to the legislative authority conferred upon the municipal authorities by Laws of 1887, Chap. 576, the 155th street viaduct was erected between August 4, 1890, and October 2, 1893 (T. R. 18, 13, 26).

At the time of the erection of the viaduct, New York Laws of 1882, Chapter 410, commonly known as the "*New York City Consolidation Act*," was in force. Section 873 of the last mentioned statute provided as follows:

> "§873. In all cases where the grade of any street or avenue which was established south of Sixty-third street on or before March fourth, eighteen hundred and fifty-two, or which has been since, or shall hereafter be established north of said Sixty-second street, shall be changed or altered in whole or in part, it shall be the duty of the board of assessors to estimate the loss and damage which each owner of land fronting on such street or avenue will sustain by reason of such change to such lands, or to any improvements therein; and make a just and equitable award of the amount of such loss or damage to the owner or owners of such lands or tenements fronting on such street or avenue and opposite thereto, and affected by such change of grade, and the amount of such award shall be included in the expense of such proceeding, and with such expense shall be assessed as provided in and by section eight hundred and seventy-seven."

Section 876 of the last mentioned statute of 1882, namely, the *Consolidation Act*, contained among other provisions, the following:

> "§876. The mayor, alderman, and commonalty shall, within four months * * * pay to the respective parties entitled

> thereunto, the amounts of such awards in their favor respectively; and in case of their neglect or default to pay the same after demand made therefor, it shall be lawful for the person or persons entitled to the same to sue for and recover the amount of said awards, * * *."

After the decision in *Sauer v. New York, supra*, the plaintiff-in-error, invoking the provisions of §873 of the *Consolidation Act*, (Laws 1882, Chap. 410), hereinabove quoted, presented to the board of assesors of the city of New York a claim for damages as for a change of grade of 155th street brought about by the erection of the viaduct (T. R. 8). The board of assessors dismissed that claim on the ground that it had no jurisdiction to entertain it. The Appellate Division of the Supreme Court of New York, however, annulled the board's dismissal of the claim and expressly directed the board *"to hear and determine the said claim upon the merits according to law"* (T. R. 8, 23). Thereafter, the Court of Appeals of the state of New York unanimously affirmed the last mentioned order (T. R. 8-9; see also *People ex rel. Crane v. Ormond*, 221 N. Y., 283).

When, in the years 1890 to 1893, the claim here involved accrued, the board of revision of correction (the predecessor of the board of revision of assessments) had *no jurisdiction* in respect of *awards* (see *Consolidation Act*, §873, hereinabove quoted; see also *Greater New York Charter*, Laws 1901, Chap. 466, §945). That board's function then related only to *assessments* (see Laws 1882, Chap. 410, §867; see also *People ex rel. Heiser v. Gilon et al.*, 121 N. Y., 551, 557).

It is true that section 951 of the *Greater New York Charter*, as revised by Chapter 466 of Laws of 1901, contained a provision that awards should be subject to review by the board of revision of assessments, but, inasmuch as under that statute the actions of both the board of assessors and the board of revision of assessments remained subject to review in the Supreme Court of New York pursuant to a common-law writ of *certiorari* (see *People ex rel. Ucalde A. P. Co. v. Seaman*, 217 N. Y., 70), the last mentioned statute was not objectionable.

The Supreme Court of New York had its origin through a statute enacted by the legislature of the Colony of New York on May 6, 1691; and that court has long possessed and still possesses the power and jurisdiction of the Court of Kings Bench and the Court of Chancery in England, except as modified by constitution or statute (see *Matter of Steinway*, 159 N. Y., 250, 255-258).

The New York Constitution of 1846, provided that there should "be a Supreme Court having general jurisdiction in law and equity" (Const. of 1846, Art. 6 and Sec. 8 of art. 14).

Under the common law of New York, a common law writ of *certiorari*, to review the proceedings of an inferior tribunal, brings up the merits as well as questions of jurisdiction and regularity, and the New York Supreme Court, in a *certiorari* proceeding, have jurisdiction to examine and correct decisions of such tribunals if erroneous (see *People v. The Assessors of Albany*, 40 N. Y., 154; *Swift v. City of Poughkeepsie*, 37 N. Y., 511, 516-517; *Mullins v. The People*, 24 N. Y., 399, 404-405;

People ex rel. v. Supervisors of Madison Co., 51 N. Y., 442, 446).

The *Code of Civil Procedure* of New York, (Laws of 1876, Chap. 448), which was in force when the property right here involved accrued, confirmed the common law in that behalf and contained, among others, the following provisions in respect of the common-law writ of *certiorari* to review the determination of an inferior tribunal:

> "§2120. **Cases where writ may issue.**
>
> The writ of certiorari regulated in this article, * * * is issued to review the determination of a body or officer. It can be issued in one of the following cases only:
>
> * * *
>
> 2. Where the writ may be issued at common law, by a court of general jurisdiction, and the right to the writ, or the power of the court to issue it, is not expressly taken away by a statute."
>
> * * *
>
> "§2138. **Hearing upon return.**
>
> The cause must be heard at a general term of the court. In the supreme court, it must be heard at a general term, held within the judicial department, embracing the county where the writ was returnable. Either party may notice it for hearing, at any time after the return is complete. Except as prescribed in the next section, it must be heard upon the writ and return, and the papers upon which the writ was granted."

[NOTE: By Laws of 1895, Chap. 946, the last quoted section was amended so as to require a hearing at a term of the appellate division of the Supreme Court, instead of at the general term.]

"§2140. **Questions to be determined.**

The questions, involving the merits to be determined by the Court upon the hearing, are the following, only:

* * *

3. Whether, in making the determination, any rule of law, affecting the rights of the parties thereto, has been violated, to the prejudice of the relator.

* * *

5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the evidence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the supreme court, triable by a jury, would be set aside by the court, as against the weight of evidence.

"§2141. **Final order upon the hearing.**

The court, upon the hearing, may make a final order, annulling or confirming wholly or partly, or modifying, the determination reviewed, as to any or all of the parties."

Section 1 of Article VI of the New York Constitution of 1894, prescribes as follows:

"The Supreme Court is continued with general jurisdiction in law and equity. * * *"

At the time of the adoption of the Constitutions of 1846 and of 1894, respectively, the Supreme Court of New York, as part of its "general jurisdiction" and in the exercise of its supervisory powers over inferior tribunals, had jurisdiction to review upon the merits, pursuant to a common-law writ of *certiorari*, judicial determinations of such inferior tribunals as the defendant boards (see *People ex rel. Uvalde A. P. Co.*

v. Seaman, 217 N. Y., 70, 76, 77; *Matter of Fitch*, 147 N. Y., 334; *People ex rel. Brisbane v. Zoll*, 97 N. Y., 203; *People ex rel. The Mayor v. Nichols*, 79 N. Y., 582; *People ex rel. v. Supervisors of Madison County*, 51 N. Y., 442); and, under the law of New York, the words "general jurisdiction," as they are used in the New York Constitutions of 1846 and 1894, defined a jurisdiction that was unlimited and unqualified and which the legislature has no power to limit or qualify, either with or without the consent of the court itself (see *People ex rel. The Mayor v. Nichols*, 79 N. Y., 582, 589-590; *DeHart v. Hatch*, 3 Hun, 375; *Mussen v. Ausable Granite Works*, 63 Hun, 367, 369; see also *Alexander v. Bennett*, 60 N. Y., 204, *Popfinger v. Yutte*, 102 N. Y., 39; *Hutkoff v. Demorest*, 103 N. Y., 377).

During the trial before the board of assessors of the claim for damages here involved and on May 11, 1918, at the instance of the municipal authorities of the city of New York, with the active co-operation of the defendant Ormond, a member of the defendant board of assessors, Chapter 619 of the Laws of New York of 1918 was enacted (T. R. 11).

By that statute (Laws 1918, Ch. 619) several sections of the *Greater New York Charter* (New York Laws of 1897, Chapter 378, as revised by Laws of 1901, Chapter 466) were amended. Section 950 of that *charter*, as thereby amended, required the board of assessors, after completing any proposed award, to publish notice to property owners to present their objections, and also provided that if, after hearing such objections, the assessors should not deem it proper to alter

their award, such objections, with the proposed award, should be presented to the board of revision of assessments. Section 944 of the *charter*, as amended by Laws of 1918, Chapter 619, contains the following provision, which the plaintiff-in-error here claims is unconstitutional and void:

> "The confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained."

The board of revision of assessments of the city of New York, whose determination is thus declared by Laws 1918, Chap. 619, to be "final and conclusive", consists of three city officials of the city of New York, namely, the comptroller, the corporation counsel and the president of the department of taxes and assessments of the city of New York (*Greater New York Charter*, §944, as amended by Laws of 1918, Chap. 619). The corporation counsel is, under the law of New York, the attorney and counsel for The City of New York and the legal adviser of the board of assessors as well as of the board of revision of assessments (*Greater New York Charter*, Section 255, as amended by New York Laws of 1917, Chap. 602; see also *People ex rel. Olin v. Hennessy*, 159 App. Div., 814, 817).

On August 31, 1918, the board of assessors made a proposed award to the plaintiff-in-error in the principal sum of $42,500, and published a notice, pursuant to §950 of the Greater New York Charter, as amended, that objections should be filed (T. R. 15). The plaintiff-in-error duly filed her objections (T. R. 15; 29-32). The city neither filed nor urged any objections to the award (T

R. 15). On October 2, 1918, over the protest of the plaintiff-in-error, that award was confirmed by the board of revision of assessments (T. R. 16).

On January 28, 1919, at the instance of the plaintiff-in-error, a common-law writ of *certiorari* was issued out of the Supreme Court of New York to review in the Appellate Division of said court the determination resulting in said award of $42,500, made by the board of assessors and confirmed by the board of revision of assessments as aforesaid (T. R. 4-7).

Upon her application for said common-law writ of *certiorari*, the plaintiff-in-error drew in question by appropriate language the validity of the above quoted provision of Chapter 619 of the New York Laws of 1918, amending section 944 of the *Greater New York Charter*, on the ground that the same and the authority exercised thereunder are repugnant to the Constitution of the United States as against the rights and remedies of the plaintiff-in-error, and in that behalf has claimed from the outset that the provision herein complained of violates the "contract" clause, the "due process of law" clause and the "equal protection of the law" clause, respectively, of the federal constitution (T. R. 19-20).

The defendant-in-error, The City of New York, thereafter made a motion at a special term of the New York Supreme Court to dismiss said writ of *certiorari* on the ground that a writ of *certiorari* will not lie to review the determination sought to be reviewed (T. R. 3), because of the provision of Laws of 1918, Chapter 619, to the effect that the determination of the board of revision of as-

sessments should be "final and conclusive." None of the allegations of the papers upon which the writ of *certiorari* was granted was denied (T. R. 3, 7-17). Under the law of New York, there being no denial of the allegations (see *People ex rel. Vil. of Brockport v. Sutphin*, 166 N. Y., 163, 170), the defendants-in-error admit, for all the purposes of the proceedings, the allegations contained in the papers upon which the writ of *certiorari* was based, namely, the allegations, among others:

(1) That the amount awarded does not include the full amount of the depreciation in market value of the premises in question and does not include the certain lawful elements of damage that resulted from the erection of the viaduct;

(2) That the amount of such award does not represent the full amount of the loss and damage sustained in the premises;

(3) That the determination of said boards was erroneous, arbitrary, illegal, in disregard of the evidence and contrary to law; and

(4) That such determination was in part based upon alleged facts in respect of which no evidence was adduced (T. R. 16-17).

The record discloses several specific instances (T. R. 16) showing that erroneous principles of law were adopted in determining the amount of damage sustained; and, although the merits are not involved, by way of completeness, one of the erroneous principles thus adopted will now be mentioned:

The record shows that the amount of damage sustained was determined upon the assumption that from an upper story of any building

erected upon the damaged premises a ramp or bridge might be built over the intervening space (of about 18 feet) so as to connect such building with the viaduct (T. R. 14, 16, 13, 26), notwithstanding that in *People ex rel. Crane v. Ormond*, 221 N. Y., 283, the Court of Appeals of the state of New York expressly declared at page 287, that "To the street so used" (*i. e.* viaduct) "access was denied to Mr. Sauer" and notwithstanding that, in his dissenting opinion in *Sauer v. New York*, 206 U. S., 536, at p. 559, Mr. Justice McKenna expressed the view (not inconsistent with that of the prevailing opinion) that "The plaintiffs have really no access to it from their land or from any building that may be put upon their land, because they may not bridge the intervening gap."

The city's motion to dismiss the writ of *certiorari* was denied by a special term order that was subsequently unanimously affirmed by the Appellate Division of the Supreme Court (T. R. 3, 35). An appeal having been taken, by permission, to the Court of Appeals of New York, that court reversed the orders of the Supreme Court and dismissed the proceeding, and, in that behalf, expressly held that the provision of Chapter 619 of the Laws of 1918, that:

> "The confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained."

(1) does not conflict with §10 of Article I of the Constitution of the United States forbidding a state to pass any law impairing the obligation of contracts; (2) does not offend against the pro-

vision of §1 of the 14th amendment of the Constitution of the United States providing that no state shall deprive any person of property without due process of law; and (3) does not contravene the provision of §1 of the 14th amendment of the Constitution of the United States providing that no state shall deny to any person within its jurisdiction the equal protection of the laws (T. R. 39, 41; 42-44).

Specification of Errors

The plaintiff-in-error claims that the Court of Appeals of the State of New York erred in dismissing the proceeding herein and in holding and deciding that the following provision contained in §944 of The Greater New York Charter, as amended by Chapter 619 of the Laws of 1918 of the State of New York, namely:

> "The confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained";

and the authority exercised thereunder are valid as against the rights and remedies of the plaintiff in-error for the following reasons:

First. Because said provision of said statute is repugnant to the provision of §10 of Article I of the Constitution of the United States, as against the rights and remedies of the plaintiff-in-error, in that such provision impairs the obligation of the contract set forth and contained in the statutes, constitution and laws of the state of New York, as more particularly described in the assignment of errors herein (T. R. 54-56).

Second. Because as against the rights and remedies of the plaintiff-in-error said provision of said Chapter 619 of the Laws of 1918 is repugnant to §1 of the 14th amendment of the Constitution of the United States providing that no state shall deprive any person of property without due process of law, in that said provision assumes to deprive the plaintiff-in-error of property without due process of law, as more particularly specified in the assignment of errors herein (T. R. 56-57).

Third: Because, as against the rights and remedies of the plaintiff-in-error, said provision of Chapter 619 of the Laws of 1918, is repugnant to §1 of the 14th amendment of the Constitution of the United States providing that no state shall deny to any person within its jurisdiction the equal protection of the laws, in that said provision assumes to deny to the plaintiff-in-error equal protection of the laws, as more particularly set forth in the assignment of errors herein (T. R., 57-58).

The amended remittitur from the Court of Appeals and the judgment entered thereon by the Appellate Division of the Supreme Court, First Judicial Department, show that the Court of Appeals ruled directly against the plaintiff-in-error upon the constitutional questions upon which this writ of error is founded (T. R. 40-41; 42-44).

POINT I

Upon the acceptance by the municipality of legislative authority to construct the 155th street viaduct and the erection thereof at a time when a statute was in force providing a remedy for the damage resulting from the change in street grade occasioned thereby, the city became charged with a contract to discharge the statutory obligation to compensate the intestate of the plaintiff-in-error for the damage sustained by the erection of the viaduct; and the Federal Constitution protects the property right that thus arose in favor of the intestate of the plaintiff-in-error against impairment by subsequent legislation.

It is true that if no statutory remedy had existed, the plaintiff-in-error would have had no right to recover the damage occasioned by the change of grade of 155th street brought about by construction of the viaduct (see *Sauer v. New York*, 206 U. S., 536; *People ex rel. Crane v. Ormond*, 221 N. Y., 283).

But, it is equally true that, in the absence of a statute conferring power, the municipality would have had no authority to erect the viaduct; for public streets in the city are under the unqualified control of the state itself and the city authorities have only such power over their use as may be delegated by the legislature (see *Beekman v. Third Avenue R. R. Co.*, 153 N. Y., 144, *152; The People v. Kerr*, 27 N. Y., 188; *McCabe v. City of New York*, 213 N. Y., 468, *479-480*).

By Chapter 576 of New York Laws of 1887, the legislature delegated to the municipal authorities of the city of New York the power to construct the viaduct and, inasmuch as sections 873 and 876 of Chapter 410, New York Laws of 1882, commonly known as *New York City Consolidation Act*, providing for the recovery and the payment of change of grade damages, were in force when the municipality built the viaduct, the city necessarily accepted the condition imposed by the last mentioned statutes to the effect that there should be made to any property owner damaged thereby "a just and equitable award of the amount" of the "loss and damage" sustained and that such award should be paid by the city.

Thus, the municipality, then known as the mayor, aldermen and commonalty of the city of New York, became charged with a contract to discharge the statutory obligation thus imposed by section 873 and 876 of said *Consolidation Act* (Laws of 1882, Chap. 410); and, since the damage and the statutory remedy therefor were synchronous, a property right immediately arose in favor of the intestate of the plaintiff-in-error and against the municipality that may not be defeated or impaired by subsequent legislation.

By virtue of section 1 of the *Greater New York Charter* (New York Laws of 1897, Chap. 378, as revised and amended by Laws of 1901, chap. 466), the defendant-in-error, The City of New York, became the successor to and subject to all the obligations of the former municipal corporation known as the mayor, aldermen and commonalty of the city of New York.

In *Ettor v. Tacoma*, 228 U. S., 148, it appeared that at the time damage was wrought by an original street grading a statutory remedy for the recovery of such damage existed, but, before the amount of the damage was ascertained, a new statute was enacted by the legislature of the state of Washington, repealing the prior statute in so far as it applied to cases like that of the plaintiffs-in-error; and, in declaring the repealing statute unconstitutional, this court, reversing the state court and remanding the cause for further proceedings, unanimously said at page 156:

> "This was to deprive the plaintiffs in error of a right which had vested before the repealing act,—a right which was in every sense a property right. * * * *The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation;*" (Italics ours).

See also

> Westervelt v. Gregg, 12 N. Y., 202, 209;
>
> Muhlker v. New York & H. R. Co., 197 U. S., 544, 570.

In *Pacific M. S. S. Co. v. Joliffe*, 69 U. S., (2 Wall) 450, this court said:

> "The claim of the plaintiff below for half pilotage fee, resting upon a transaction regarded by the law as a *quasi* contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far

perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action; the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed."

POINT II

The remedy subsisting in a state when and where an obligation is made or created is a part of the obligation and any subsequent statute of a state that so affects that remedy as substantially to impair or lessen the value of the obligation is forbidden by the Federal Constitution and is, therefore, void.

Edwards v. Kearzey, 96 U. S., 595;
Siebert v. Lewis, 122 U. S., 284;
Bronson v. Kinsie, 1 How., 311;
City of Cleveland, Tenn. v. United States, 166 Fed. Rep., 677.

POINT III

The obligation of a contract is impaired in the sense of the constitution by any statute which prevents its enforcement or which abridges the remedy for enforcing it which existed at the time it was contracted and does not supply an alternative remedy equally adequate and efficacious.

McGahey v. State of Virginia, 135 U. S., 662;
Barnitz v. Beverly, 163 U. S., 118;
Walker v. Whitehead, 83 U. S., (16 Wall) 314;
People ex rel. Reynolds v. Common Council, 140 N. Y., 300.

POINT IV

The provision of Chapter 619 of the Laws of 1918, hereinbefore quoted, which assumes to withdraw from the plaintiff-in-error the right to review, in the Supreme Court of the State of New York, pursuant to a common-law writ of certiorari, the determination of the board of assessors in respect of the amount of damages that accrued when that remedy subsisted and in respect of the principles of law adopted in estimating the amount of that damage, without supplying an alternative remedy equally adequate and efficacious, is null and void, (a) because of conflict with Section 10 of Article 1 of the Constitution of the United States, in that such amendment purports to be a law that would impair the obligation of a contract that already existed in favor of the plaintiff-in-error and (b) because of conflict with Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that such provision assumed to deprive the plaintiff-in-error of property without due process of law.

The plaintiff-in-error recognizes that the statute now complained of is valid in so far as applicable to change of grade damages *that may accrue in the future*, for the reason that a property owner has no common law right to recover damages arising from a change of grade in the street in front of his premises, and, consequently, the legislature has power entirely to withhold a remedy for damages that may accrue *in the future*

and thus has power to determine in what manner and before what tribunal any such claim arising in the future may be heard.

Nor does the plaintiff-in-error here question the power of the legislature to modify the procedure in the courts for the enforcement of a right.

The plaintiff-in-error insists, however, that where a property right has already accrued and a contract to discharge a statutory obligation has already arisen, the then existing remedy for the enforcement thereof may not be withdrawn, unless an alternative remedy equally adequate and efficacious be supplied:

In *McGahey v. State of Virginia*, 135 U. S., 662, the question arose as to whether a statute of Virginia, which required the production of state bonds in order to establish the genuineness of coupons clipped therefrom and prohibited expert testimony to prove the genuineness of such coupons, was repugnant to the Constitution of the United States; and the United States Supreme Court, holding the statute unconstitutional, said at page 672:

> "It is well settled by the adjudications of this court, that the obligation of a contract is impaired, in the sense of the Constitution, by any Act which prevents its enforcement, or which materially abridges the remedy for enforcing it, which existed at the time it was contracted, and does not supply an alternative remedy equally adequate and efficacious" (citing authorities).

When the damage was wrought by the erection of the 155th street viaduct here involved, the

amount of damage to be awarded was required to be estimated in the first instance and an award made therefor by the board of assessors of the city of New York (*Consolidation Act*, Laws of 1882, Chap. 410, §873), and, as will appear by an examination of the authorities and statutes referred to on pages 10-13 of the foregoing statement of the case, under the law of the state of New York in force when the property right accrued, the remedy of the intestate of the plaintiff-in-error then embraced the right to invoke the jurisdiction of the Supreme Court of New York, a court of general jurisdiction, to obtain in the Supreme Court of New York, pursuant to a common-law writ of *certiorari*, a hearing, involving the merits, upon the question, among others, as to whether in making a determination of the amount of damage sustained any rule of law had been violated by the board of assessors to his prejudice. The common law of New York upon that subject was confirmed by provisions of the *New York Code of Civil Procedure* (see authorities cited at pp. 10-13, *ante*). Section 2140 of that Code of Civil Procedure, in force when damage was wrought by the erection of the viaduct, contained, among others, the following provision, in relation to the hearing in the Supreme Court, upon a review of a determination of an inferior tribunal pursuant to a common-law writ of *certiorari*:

> "§2140. **Questions to be determined.**
>
> The questions, involving the merits to be determined by the court upon the hearing, are the following, only:
>
> * * *
>
> 3. Whether, in making the determination any rule of law, affecting the rights of

the parties thereto, has been violated, to the prejudice of the relator.

* * *

5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the supreme court, triable by a jury, would be set aside by the court, as against the weight of evidence."

By the statute here complained of, namely, Laws of 1918, Chapter 619, the following provision was incorporated into section 944 of the *Greater New York Charter* in respect of awards of damage made by the board of assessors:

> "The confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all persons and parties whomsoever with respect to the amount of damage sustained."

The effect of the statutory provision last above quoted, as construed by the Court of Appeals of New York, is to withdraw from the plaintiff-in-error a right possessed when the damage was wrought as a part of her remedy to ascertain the amount to be awarded in the premises, namely, the right to invoke the jurisdiction of the Supreme Court of New York to review upon the merits, pursuant to a common-law writ of *certiorari*, any award of damage that might be made by the board of assessors in the premises, and to substitute, in the place of a hearing in the Supreme Court of New York, the final determination of the board of revision of assessments of the city of New York, consisting of three officials of the city of New York, namely, the comptroller, the corporation counsel and the president of the

department of taxes and assessments of the city of New York, and that, too, without expressly requiring, as a matter of right, any notice to or a hearing or any opportunity to be heard on the part of the plaintiff-in-error before such board of revision of assessments (see *Stuart v. Palmer*, 74 N. Y., 183; *Chicago, M. & St. P. R. Co. v State of Minnesota*, 134 U. S., 418; *Coe v. Armour Fertilizer Works*, 237 U. S., 413, *424, 425.*)

It is respectfully submitted that such a statutory provision does not furnish an alternative remedy equally adequate and efficacious with the remedy that subsisted when the obligation was made and created and when the property right of the intestate of the plaintiff-in-error became a vested right.

A hearing upon the merits before an impartial and disinterested tribunal whose decisions are the result of independent conclusions reached after an unprejudiced examination of the law and the facts, is the most valuable part of any remedy.

How, then can it be contended that a determination (to be made without notice or an opportunity to be heard except as a matter of favor) by the board of revision of assessments of the city of New York, composed of the three city officials above mentioned, is as adequate and efficacious as a hearing in the Supreme Court pursuant to a common-law writ of *certiorari?*

The corporation counsel, one of the members of the board of revision of assessments, is, under the law of the state of New York, the attorney and counsel for the city of New York as

well as the legal adviser of the board of assessors and of the board of revision of assessments (see *Greater New York Charter*, §944, as amended by Laws of 1918, Chapter 619; *id.*, §955, as amended by Laws of 1917, Chapter 602; *People ex rel. Olin v. Hennessy*, 159 App. Div., 814, 817). The other two members of the board of revision of assessments are also city officials and neither of them is required to be a lawyer.

In the very nature of things, the board of revision of assessments is more likely than a court of general jurisdiction to reach their conclusion as a result of prejudice or of considerations of expediency or political exigency rather than as a result of an impartial and disinterested judicial consideration of the law and the facts.

That the final determination of the board of revision of assessments is not as adequate and efficacious a remedy for the property owner as is the right to a hearing upon the merits in the New York Supreme Court, pursuant to a common-law writ of *certiorari*, is clearly demonstrated by the recent history of the conduct of the board of assessors and of the board of revision of assessments in similar cases:

Shortly before the enactment of the statute here complained of three separate appellate courts had had occasion to annul, at the instance of property owners, respective determinations of the board of assessors (*People ex rel. Olin v. Hennessy*, 159 App. Div., 814, 817; *People ex rel. Hallock v. Hennessy*, 152 App. Div., 767, 769, aff'd. 206 N. Y., 750; *People ex rel. Uvalde A. P. Co. v. Seaman*, 217 N. Y., 70, 75). In the

Olin case, supra, the Appellate Division viewed the action of the board of assessors "*as a deliberate and willful refusal to perform their duties.*" In the *Uvalde* case, *supra*, the Court of Appeals of New York *expressly condemned as "arbitrary"* and "*in substance and effect illegal*" the *action of both of the defendant boards* in fixing the amount of an award. The defendant-in-error Ormond participated in each of those three determinations and the defendant-in-error Hahlo in the determination annulled in the *Uvalde* case.

Thus, it is manifest that the two boards, to whose tender mercy the determination of the value of a vested property right of the plaintiff-in-error is thus committed, are among the most arbitrary, among the most autocratic and within their jurisdiction, as interpreted by the Court of Appeals, among the most powerful tribunals in the country, for our highest courts are circumscribed by a respect for the law and by a true sense of justice and neither of these boards is thus embarrassed.

While it is true that no valid objection may be urged by the plaintiff-in-error on the ground that her claim must be passed upon by the board of assessors in the first instance, notwithstanding that the members of that board are removable from office at the pleasure of the mayor of the city (*Greater New York Charter*, Laws 1901, Chap. 466, §95; *id.*, as amended by Laws 1916, Chap. 516, §943), it should be noted that so long as the determination of the board of assessors is reviewable in the Supreme Court

pursuant to a common-law writ of *certiorari*, the remedy is adequate, for the New York Supreme Court also has power by *mandamus* or otherwise to enforce compliance by that board with any decision that the court may make in a certiorari proceeding (see *People ex rel. Oneida National Bank v. Supervisors of Madison County*, 51 N. Y., 442, 446; *People ex rel. Olin v. Hennessy*, 159 App. Div., 814, 818).

In *Matter of City of Rochester v. Holden*, 224 N. Y., 386, the Court of Appeals declared unconstitutional a provision of the charter of the city of Rochester whereby the *common council* of that city was given authority to examine, disapprove or reject the report of commissioners appointed to fix compensation for land taken in a condemnation proceeding; and the court in that case said at pages 395, 396:

> "The common council is not the impartial and disinterested tribunal which the legislature is bound to provide. The city of Rochester is a party to the proceeding. The common council, within the authorization of the charter of the city, *represents* and *is bound to protect its interests. The common council is not, it cannot be, disinterested in investigating and deciding the claims of the landowners against the city.* (*People ex rel. Eckerson v. Trustees of Haverstraw*, 151 N. Y., 75; *Woodland Avenue*, 178 Penn. St., 325; *Peirce v. City of Bangor*, 105 Me., 413; *Matter of City of Rochester*, 208 N. Y., 188) * * *.
>
> "* * * The right of appeal so given is not to be regarded as a matter of favor or privilege, but as a matter of right, *because the common council*, by whose determination the compensation was fixed, *was interested.*" (Italics ours.)

In re [illegible] change of grade of *Woodland Ave.*, 178 Penn. St., 325 (cited with approval in the *Holden* case, *supra*), the court said at pages 328-329:

> "The idea that the corporation (*i. e.* the city of Allegheny) exercising the right of eminent domain might exercise judicial jurisdiction over its own causes, appoint viewers to ascertain the damage it had inflicted upon a property owner, require him to come before it and contest the conclusions of the viewers, confirm or set aside the report at its will, and set up its own action in support of the plea of *res adjudicata*, when called upon in a court of law to answer for the taking, injury or destruction of the property of the citizen, gets no support or countenance from the constitution or the general law of 1874. *It is too monstrous to be tolerated.* The city is the taker. The citizen whose property is affected is the complaining party, the plaintiff. The controversy must be litigated in, and determined by, the established judicial tribunals to which the decision of all other controversies is committed. *The defendant can have no better right to sit as judge in its own case than the plaintiff, and so much of the local act of 1870 as professed to confer this power upon the defendant is a palpable violation of the declaration of rights and of section 7, art. 3 of the constitution.*" (Italics ours.)

In the case at bar, it is not land that is being condemned for public purposes, but, in its last analysis, the question to be determined is the value of a property right in favor of a property owner against a municipality, consisting of a chose in action that accrued as far back as 1893 and, as it is respectfully submitted, the federal constitution protects the citizen in re-

spect of personal property as well as real property.

In *Ohio Valley Water Co., v. Ben Avon Borough*, 253 U. S., 287, this court held that withholding from the courts power to determine the question of confiscation according to their own independent judgment as to both the law and the facts, when the act of a state public service commission in fixing the value of a water company's property for rate making purposes comes to be considered on appeal must be deemed to deny due process of law.

In the case at bar, it was the value of a property right that accrued as far back as 1893, which was to be determined, and when that right accrued the remedy for its enforcement embraced the right to a hearing upon the merits in the New York Supreme Court pursuant to a common law writ of *certiorari*, concerning the value of that property right; and it would seem manifest that the statute of 1918 here complained of must be deemed to deny due process of law, for that statute not only withdraws and withholds a hearing in the courts, but commits the final determination of the value of the vested property right of the plaintiff-in-error against the city to an inferior tribunal composed of three city officials (see *Matter of City of Rochester v. Holden*, 224 N. Y., 386, 395, 396) and that, too, without requiring as a matter of right that notice or an opportunity to be heard before the [illegible] should be given to the property owner.

So far as counsel are aware, all of the authorities that refer to the right of appeal as not being a natural or inherent right *relate to an appeal from a judgment or an order of a court* where a party has been given a hearing in a court. The complaint of the plaintiff-in-error is that, whereas, when the damage was wrought, she had a right to a day in a court of general jurisdiction, she is not, under the statute here attacked, to be afforded an opportunity to litigate in any court, but is to be bound by the determination of a board composed of three city officials.

Besides, we respectfully submit that a review pursuant to a common-law writ of *certiorari* is not analogous to an appeal that is the creature of some statute. The writ of *certiorari* was devised as an independent proceeding for the very purpose of affording a day in a court of general jurisdiction in cases where none existed, to the end that the court might exercise a superintending control of inferior tribunals and see to it that they made their determinations upon the merits according to law.

In *Railroad Company v. Grant*, 98 U. S., 398, where this court stated that a party to a suit has no vested right to an appeal or a writ of error from *one court to another* and that such a privilege, once granted, may be taken away, the litigant had had a day in a court, namely, the Supreme Court of the District of Columbia, and the writ of error was dismissed because Congress had taken away the jurisdiction of the Supreme Court of the United States to hear and determine the case.

As above pointed out, the jurisdiction of the Supreme Court of New York, under the Constitution of the state of New York, was not subject to limitation by legislative enactment (see *People ex rel. The Mayor v. Nichols*, 79 N. Y., 582; *Tallman v. Hatch*, 3 Hun, 375, *supra*; see also p. 1213 *infra*).

Moreover, we respectfully submit that the provision of the New York State Constitution, rendering inviolate by legislative enactment the jurisdiction of the New York Supreme Court, was not enacted because of any pride in the jurisdiction of the court itself, but in order that the rights and the remedies of litigants might be safeguarded and preserved and that, therefore, the plaintiff-in-error under the circumstances hereinabove set forth, acquired a vested right in the jurisdiction in the New York Supreme Court as fixed by the constitution of the state in so far as that jurisdiction related to the remedy for the enforcement of a property right that had vested before Laws 1918, Chap. 619 was enacted (see *New Orleans v. Houston*, 119 U. S., 265).

The learned court below seems to have based its determination principally upon the proposition that the legislature, in creating the claim for damages resulting from a change in a street grade, did not provide that the claim should be primarily litigable in the Supreme Court of New York, but required that in the first instance the board of assessors of the city of New York should estimate the damage and make an award (see *People ex rel., Crane v. Hahlo*, 228 N. Y., 259, 264), and the court below recognizes no dis-

tinction in that regard as between a claim for damages that had already vested and one to arise in the future.

But, as it is respectfully submitted, the fact that the claim was not litigable in the first instance in the New York Supreme Court does not militate against the propositions that at the time the damages accrued the plaintiff-in-error, had *as a part of her remedy*, the right to invoke the jurisdiction of the Supreme Court of New York to review, upon the merits, pursuant to a common-law writ of *certiorari*, any determination of the board of assessors of the city of New York in the premises and that a hearing in that court pursuant to such a writ was the very circumstance that rendered the remedy efficacious.

In *People ex rel. Swift v. Lacv*, 204 N. Y., 478, relied on by the court below, the court in its opinion referred to claims against the state itself and pointed out that the Supreme Court of New York had not jurisdiction of such claims solely because of the immunity of the state from suit, and not because the court did not have jurisdiction of such a cause of action. The principle upon which that cause was decided is not applicable here, because the city of New York, against which the claim of the plaintiff-in-error is asserted, is not a sovereignty, but stands upon the same footing as any private litigant.

In the case at bar, the court below suggested that the claim of the plaintiff-in-error was not against the city, but if allowed, was to be collected by assessment. As already pointed out,

however, section 876 of the *New York City Consolidated Act* (New York Laws of 1882, Chapter 410) provided that the mayor, aldermen and commonalty of the city of New York should pay the amount of awards made to property owners for change of grade damages and that, in case of default, it should be lawful for the property owners to sue for and recover the amount of such awards and the city of New York is now subject to all the obligations of the former municipality (*Greater New York Charter*, Laws 1901, Chap. 466, §1). Thus the claim of the plaintiff-in-error was certainly primarily against the municipality itself and whether or not the city might be reimbursed by the collection of assessments is immaterial. Besides, in the case at bar, the statute, pursuant to which the viaduct was erected, contemplated that, in the discretion of the board of estimate and apportionment of the city of New York, at least *one-half* of the amount required should be paid by the city at large (see section 3, Chapter 576, New York Laws of 1887, as amended by Chapter 979, New York Laws of 1895, quoted at pp.6-7 of the foregoing statement). Consequently, it necessarily follows that the claim of the plaintiff-in-error was one against the city itself, to such an extent in any event as to make the city an interested party to the controversy, the final determination of which was committed by the statute here complained of to an inferior tribunal composed of three of its officials; and as a matter of fact the city itself has been the active adversary of the plaintiff-in-error throughout the long litigation that has taken place during the last twenty-five years.

In its opinion (see *People ex rel. Crane v. Hahlo*, 228 N. Y., 309, 319-320), the court below suggested that the *status* of the claim of the plaintiff-in-error had been preserved by one statutory amendment after another down to the present time. But we respectfully submit that no statutory provision was necessary for the preservation of the *status* of the claim here involved; for the right of the plaintiff-in-error to an award for the damages sustained by the change of grade of 155th street brought about by the erection of the viaduct was safeguarded by provisions of the federal constitution (see *Ellor v. Tacoma*, 228 U. S., 148, *156*).

POINT V.

The provision of Chapter 619 of the Laws of 1918, in so far as it assumes to substitute the confirmation by the board of revision of assessments of the city of New York of an award made by the board of assessors, in the place of a review thereof upon the merits, in the New York Supreme Court, pursuant to a common-law writ of certiorari, is null and void as against the rights of the plaintiff-in-error, in that such provision assumes to deny to the plaintiff-in-error the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

In the case at bar, the property right, the value of which was to be determined, arose as far back as 1893, and the statute, here complained of, gives The City of New York, the ad-

versary of the plaintiff-in-error, *three* representatives, and the plaintiff-in-error *none*, upon the inferior tribunal, which the provision of the statute, here complained of, declares to be the *final* tribunal for the determination of the value of that property right.

The City of New York is but a municipal corporation and not a sovereignty. The statute in force when the property right of the intestate of the plaintiff-in-error arose imposed upon the mayor, aldermen and commonalty of the city of New York the liability to pay any award that might be made by the board of assessors and subjected that municipality to a suit for the recovery of the amount of such award, in case of default. The obligations of the former municipality have devolved to and become operative upon the defendant-in-error, The City of New York, by virtue of the enactment of the *Greater New York Charter* (see Laws of 1901, Chapter 466, §1).

As it is respectfully submitted, a statute giving one party to a litigation three representatives and the other none upon the tribunal invested with power finally to determine a controversy between those parties does not afford "equal protection of the laws" in a case where the property right, the value of which is to be determined, had already become fixed and vested before the statute was enacted. (See In *re* * * * *change of grade of Woodland Avenue*, 178 Penn. St., 325, 328, 329; *Peirce v. Bangor*, 105 Me., 413, 423, 424, 425; *Matter of City of Rochester v. Holden*, 224 N. Y., 386, 393-394; see also *Ettor v. Tacoma*, 228 U. S., 148).

Besides, other property owners that sustained damage in respect of their property by reason of changes in the grade of streets made prior to the enactment of the statute here complained of have, under the law of New York, been afforded a hearing in the New York Supreme Court, pursuant to a common-law writ of *certiorari*, upon a review of the determinations of inferior tribunals awarding damages (see *Matter of Fitch*, 147 N. Y., 334; *People ex rel. Brisbane v. Zoll*, 97 N. Y., 203; *People ex rel. Uvalde A. P. Co., v. Seaman*, 217 N. Y., 70); and the plaintiff-in-error should as it is respectfully submitted, have equal protection of the laws in that behalf.

CONCLUSION

The judgment under review should be reversed and the case remanded.

Dated New York, October, 1921.

Respectfully submitted,

JOHN M. HARRINGTON,
ARCHIBALD R. WATSON,
HERBERT H. GIBBS,
Of counsel for plaintiff-in-error.

Supreme Court of the United States

No. 197, October Term, 1921.

GERTRUDE CRANE, as Administratrix, etc., of GEORGE W. SAUER, deceased,

Plaintiff-in-Error,

against

LOUIS H. HAHLO, GEORGE P. NICHOLSON and JACOB A. CANTOR, as and constituting the Board of Revision of Assessments of the City of New York, and others, including the City of New York,

Defendants-in-Error.

BRIEF FOR DEFENDANTS-IN-ERROR.

John F. O'Brien,

Attorney for Defendants-in-Error.

Charles J. Nehrbas,

of counsel.

(18653) Stillman Appellate Printing Company.

SUBJECT INDEX.

LIST OF CASES CITED.

Supreme Court of the United States.

GERTRUDE CRANE, as Administratrix, etc., of GEORGE W. SAUER, deceased,
Plaintiff-in-Error,

against

LOUIS H. HAHLO GEORGE P. NICHOLSON and JACOB A. CANTOR, as and constituting the Board of Revision of Assessments of the City of New York, and others, including the City of New York,
Defendants-in-Error.

No. 107, October Term, 1921.

BRIEF FOR DEFENDANTS-IN-ERROR.

This is a writ of error to the Supreme Court, Appellate Division, First Judicial Department, of the State of New York.

Statement of the Case.

On June 30, 1916, plaintiff-in-error filed with the board of assessors of the City of New York a claim for damage to real property situated at the corner of 8th Avenue and West 155th Street, in the Borough of Manhattan, City of New York, occasioned by the erection of a viaduct in and along 155th Street (T. R., 8) in the year 1893 (T. R., 18). The board of assessors was clothed with jurisdiction to hear and determine such claim.

> Peo. *ex rel.* Crane vs. Ormond, 221 N. Y., 283.

After due hearing, the board of assessors, on June 21, 1918, made an award to the plaintiff-in-error in the principal sum of $40,000 (T. R., 13). The proceedings following the making of an award for damages by the board of assessors are governed by Section 950 of the Greater New York Charter, as amended by Chapter 619 of the Laws of New York of 1918, which section provides as follows:

> "§950. It shall be the duty of the board of assessors, when it has completed any proposed assessment or award, to give notice to the owner or owners; such notice shall be published daily in the City Record and the corporation newspapers for at least ten days successively. The notice shall describe the limits within which it is proposed to lay the said assessment, or, in case of awards, the block and lot numbers of the property affected, and shall contain a request for all persons whose

interests may be affected thereby, and who may be opposed to the same, to present their objections in writing, to the board of assessors within thirty days from the date of such notice, and specifying a time and place after the expiration of the said thirty days when and where the said objections will be heard and testimony received in reference thereof. If, after hearing and examining such objections and testimony, the assessors shall not deem it proper to alter their assessment or award, or having altered it there shall still be objections to the same, it shall be their duty to present such objections with the proposed assessment or award to the board of revision of assessments. If no objections shall be received, or if the board of assessors shall alter the assessment or award so as to satisfy the objectors, said board shall forthwith declare the said assessment or award confirmed, and shall transmit the same to the comptroller for entry and collection of said assessment and for payment of said award. An assessment or award so confirmed shall be of the same force and effect as if confirmed by the board of revision of assessments. The confirmation by the board of assessors of any such award shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained."

The award to the plaintiff-in-error was advertised for objections pursuant to the above quoted section (T. R., 13). Objections were filed by the

plaintiff in error, and oral argument was had (T. R., 14). The board of assessors determined not to alter its award and presented the same, together with the objections thereto, to the board of revision of assessments (T. R., 15). A hearing was had before the board of revision of assessments, pursuant to the provisions of Section 944 of the Greater New York Charter, as amended by Chapter 619 of the Laws of New York of 1918, which reads as follows:

> "§944. The comptroller, corporation counsel and president of the department of taxes and assessments shall constitute the board of revision of assessments. The said board, or a majority thereof, shall have and perform all the powers and duties relative to the revision, correction and confirmation of assessments specified in the various laws and ordinances relating to assessments in any part of the city of New York, as hereby constituted, other than assessments made by commissioners appointed by a court of record, and other than those confirmed by the board of assessors; said board shall have power to consider, on the merits, all objections made to any such assessment, or to any award for damage made by the board of assessors, and to subpoena and examine witnesses in relation thereto, and to confirm said assessment or award, or to refer the same back to the board of assessors for reversal and correction in such respects as it may determine. The revision of such assessments and awards shall be made without delay, so that unless the same are referred back for revisal and

> correction they shall be confirmed within thirty days from the time they shall, respectively, be presented for confirmation, and if not so confirmed or referred back they shall be deemed to be confirmed at the expiration of thirty days from the time they shall be, respectively, so presented for confirmation. All such assessments, immediately upon confirmation, shall be transmitted to the comptroller for entry and collection and all such awards, immediately upon confirmation, shall be certified to the comptroller for payment. The confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained."

After the hearing before the board of revision of assessments, the matter was referred back to the board of assessors with instructions to increase the amount of the award to $42,500 (T. R., 15).

On August 31, 1918, the board of assessors made a new award in the principal sum of $42,500, together with interest amounting to $63,750 and advertised for objections (T. R. 15, 28). The plaintiff-in-error again filed objections, which were again overruled, and the matter again came before the board of revision (T. R., 15). On October 2, 1918, the new award was confirmed by the board of revision (T. R., 16).

After fruitlessly attempting to punish the members of the board of assessors for contempt (T. R., 13-14) the relator sued out a writ of certiorari to

review before the Supreme Court of the State of New York the determination of the board of assessors, as confirmed by the board of revision of assessments (T. R., 4-6). The only ground alleged in the papers for seeking a review of the award was that it was insufficient in amount (T. R., 16-17).

The defendant-in-error, The City of New York, moved, before the Special Term of the Supreme Court of the State of New York, upon the writ of certiorari, the order allowing the same, and the papers upon which the order was based, for an order dismissing the writ (T. R., 3). This motion was based upon that portion of Section 944 of the Greater New York Charter, as amended by Chapter 619 of the Laws of New York of 1918, which provides as follows:

> "The confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained."

The City's motion was denied by the court at Special Term, on the ground that the statute upon which the motion was based violated a provision of the constitution of the State of New York (T. R., 33).

The City appealed to the Appellate Division of the Supreme Court of the State of New York, and upon such appeal the order was affirmed (T. R., 35).

The City took a further appeal to the Court of Appeals, upon which appeal the orders below were reversed, and the City's motion to dismiss the proceeding instituted by the plaintiff-in-error was granted (T. R., 39-41). Thereupon a final order was made by the Appellate Division of the Supreme Court, dismissing the proceeding (T. R., 42-44).

The plaintiff-in-error then sued out a writ of error to review, in this Court, the final order of the Appellate Division of the Supreme Court of the State of New York (T. R., 52-65), claiming that such order upheld the validity of a statute which deprived her of a right under the constitution of the United States.

POINT I.

The provision of the statute for the original determination of the claim of plaintiff-in-error by the board of assessors is not open to attack.

Although the members of the board of assessors are appointed by the mayor of the City of New York, they are not officers of the city. They are not charged with the performance of any duties on behalf of the City of New York, but perform state functions exclusively. They are primarily charged with the duty of levying assessments for the physical improvement of streets, as distinguished from the acquisition of legal title to property for street purposes. Incidently, they are authorized to make awards for damages occasioned by changes of street grades.

The levying of assessments is a branch of the taxing power, which is a state and not a municipal function.

> Consolidated Ice Co. vs. Mayor, etc., of New York, 166 N. Y., 92, at pp. 101-102.

The making of awards for damage is a branch of the judicial power,

> Peo. *ex rel.* Heiser vs. Gilon, 121 N. Y., 551, at p. 556,

which is likewise a state function.

The board of assessors in no sense represents The City of New York either in making awards or in levying assessments.

> Heiser vs. Mayor, etc., of New York, 104 N. Y., 68, at pp. 71-72.

The amounts of the awards made are included in the assessments levied (Greater New York Charter, §951 as amended by Chap. 619 of the Laws of New York of 1918), so that the City, as such, is not, strictly speaking, a party to the proceeding at all.

The fact that the members of the board are appointed by the mayor is no more ground for objection to their acting upon the claim of the plaintiff-in-error than is the fact that the judges of the federal courts are appointed by the President ground for objection to their sitting in cases to which the government is a party. In the State of New York, the court or board of claims consists of judges ap-

pointed by the Governor. Their jurisdiction is exclusively that of determining claims against the State. The mayor of the City of New York appoints the city magistrates (police justices) and also, in case of vacancy, appoints the judges of the municipal (civil) courts. The cases in which judicial and *quasi* judicial officers are appointed by the head of the state or city government are too numerous to mention. Are all such officers disqualified from acting where the interests of the State or the City may be concerned?

In *Matter of the City of Rochester vs. Holden*, 224 N. Y., 386, cited by plaintiff-in-error, the Court criticized a statute which provided that the common council of the city was to pass upon the amount of compensation to be made for the taking of property by the city. As the Court said in that case

> "The City of Rochester is a party to the proceeding. The common council, within the authorization of the charter of the city, represents and is bound to protect its interests."

224 N. Y., at p. 395.

No such situation exists here. The board of assessors does not represent the City and is not bound to protect its interests. It is an independent tribunal representing the state, in the sense that all judicial tribunals represent the state, and no greater objection can be raised against its jurisdiction on constitutional grounds than can be urged against the many other tribunals whose members are not chosen by popular vote.

POINT II.

The sole question remaining is that of the right of review. It is well settled that such right is not protected by the constitution.

Unless the plaintiff can successfully attack the constitution of the tribunal of original jurisdiction (the board of assessors) the sole remaining question is merely that of the right of review.

Plaintiff-in-error complains that she formerly had a right of review, by writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, which right the statute has taken away. It is true that in 1893, when her claim accrued, she had a right to review a determination of the board of assessors in the courts of the state. She now has, under the statute, the right to have her objections to the determination of the board of assessors heard by the board of revision of assessments. That board, like the board of assessors, is in no sense the representative of the City but performs exclusively state functions.

> Tone vs. Mayor, etc. of New York, 70 N. Y., 157, 165.

The statutory provision:

> "The confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all parties and persons

> whomsoever with respect to the amount of damage sustained"

does not deprive the plaintiff of her right of review in the courts. It merely makes the determination of the board final as to the amount of damage sustained. She may still review before the Appellate Division of the Supreme Court other objections to any determination that may be made.

> See Opinion of the Court of Appeals in the case at bar (T. R., 48).

Moreover, if the statute did take from the plaintiff-in-error all right of review of an award made by the board of assessors, it would not be in violation of either the Constitution of the United States or the Constitution of the State of New York.

> "But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary."

> Railroad Company vs. Grant, 98 U. S., 398, pp. 401-402;
> Gwin vs. United States, 184 U. S., 669, at pp. 674-675;
> Croveno vs. Atlantic Avenue Railroad Co., 150 N. Y., 225, at p. 228;
> Leech vs. Anwell, 154 N. Y. App. Div., 170.

The statute here under discussion is not a novel exercise of legislative power. The Legislature of the State of New York has frequently provided that the determinations of boards and commissions in cases of this character should be final and conclusive, and the policy of such provisions has received the approval of the Court of Appeals.

> Matter of Southern Boul. R. Co., 143 N. Y., 253, 259;
> Matter of Commrs. of Central Park, 50 N. Y., 493, 496.

The wisdom of the policy thus approved finds its most complete justification in its application to the board of assessors of the City of New York. That board discharges all the duties incident to the levying of assessments for regulating and grading streets, paving, sewers, etc. The large item in all such assessments is the cost of the work itself. Awards for damage included in such assessments constitute an almost infinitesimal portion of the total. Indeed, it has been calculated that such awards barely exceed one per centum of the total amount of the assessments annually levied by the board of assessors. It is by no means unusual for a proceeding to be pending involving the improvement of a long thoroughfare through an undeveloped section of the city, the cost of which improvement may run into hundreds of thousands of dollars, and in which proceeding two or three damage claims, involving a few hundred dollars, may be presented. The rights of such claimants to a review of the board's determination of their

damage by writ of certiorari are of small importance in comparison with the public interest involved in the speedy determination and imposition of a large assessment.

The plaintiff-in-error argues that the defendants-in-error have admitted, by not denying, that the determination of the state boards was, among other things, "erroneous, arbitrary, illegal, in disregard of the evidence and contrary to law" (Brief for plaintiff-in-error, p. 16).

While it is true that, for the purposes of this proceeding, the defendants-in-error have admitted, by not denying, the *facts* alleged in the papers on which the writ of certiorari was granted, it is equally true that such failure to deny does not admit conclusions of law. In the case cited by the plaintiff-in-error, the rule is set forth as follows:

> "While the statements in the return import absolute verity, when it is silent as to material allegations of fact contained in the petition, the presumption is that the officers making the return intended to admit those allegations, *but this presumption does not extend to conclusions of law which are not admitted even if not denied.*" (Italics ours.)
>
> People *ex rel.* Brockport vs. Satphin, 166 N. Y., 163, at p. 170.

All the statements claimed to be admitted at page 16 of the brief for plaintiff-in-error are manifestly conclusions of law.

With respect to the instance of alleged error specifically discussed, namely that concerning the right of the owner of the damaged property to connect with the viaduct from an upper story of a building sufficiently high, no error is involved in the determination of the board of assessors. The expressions quoted from the opinion of the Court of Appeals in 221 N. Y., 283, and the dissenting opinion in 206 U. S., 536, were not necessary to the determination of the questions then before the respective courts. The right of the owner of the premises in question to build a ramp or bridge from an upper story of a building to be erected on the premises, connecting with the viaduct, cannot be and has not been questioned by the City authorities. Such ramp or bridge would be no more illegal than an ordinary runway from an abutting building across the sidewalk to the roadway of the street. It is only structures which detract from the usability of the street for highway purposes, and which constitute an appropriation of a part of the street to private uses, that are condemned.

MacMillan vs. Klaw & Erlanger, 107 N. Y. App. Div., 407.

Structures which add to or facilitate the use of a street as a highway are always permitted.

Dougherty vs. Village of Horseheads, 159 N. Y., 154;
DuBois vs. Kingston, 102 N. Y., 219;
Robert vs. Powell, 168 N. Y., 411.

A ramp or bridge between the plaintiff's property and the viaduct would clearly be of the latter character. Similar structures have been erected, with the consent of the municipal authorities, in many parts of the City of New York.

The judgment should be affirmed.

New York, October, 1921.

Respectfully submitted,

JOHN F. O'BRIEN,
Attorney for Defendants-in-Error.

CHARLES J. NEHRBAS,
of counsel.

duties of the Board of Assessors and of the Board of Revision of Assessments (Laws of New York, 1918, c. 619). The Comptroller, Corporation Counsel and President of the Department of Taxes and Assessments of the City, had constituted the Board of Revision of Assessments since 1901, and as such were given power to review any award of damages made by the Board of Assessors, and the only essential change made by the amendment of 1918 consisted in the provision that:

"The confirmation of any such award by the board of revision of assessments shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained."

The plaintiff in error, not being satisfied with the amount of the award in her favor by the Board of Assessors, filed objections thereto, which were overruled, and thereupon, pursuant to law, the proposed award with the objections was presented to the Board of Revision of Assessments and was by it confirmed.

The plaintiff in error, continuing dissatisfied, thereupon appealed to the Supreme Court of New York for, and procured, a writ of certiorari to review the determination of the award by the Board of Assessors and the confirmation of it by the Board of Revision of Assessments. The ground of this application was that the quoted provision of the act of the New York Legislature of 1918, making the confirmation of the award by the Board of Revision of Assessments final and conclusive "with respect to the amount of damage sustained," was repugnant to the Constitution of the United States and void, and that the right to such review by certiorari, theretofore existing, was not affected by it.

A motion by the city to dismiss the writ on the ground that plaintiff in error's right to it was cut off by the amendment to the statute was denied by the Supreme Court and by the Appellate Division of the Supreme

Court, but this decision was reversed by the Court of Appeals in the judgment which is now under review.

It is conceded that at the time the viaduct was erected and until the Act of 1918, under the practice of New York, the plaintiff in error had the right to a general review in the Supreme Court, a court of general jurisdiction, of the proceedings before the Board of Assessors until 1901 and of the Board of Revision of Assessments until the amendment in 1918. The holding of the Court of Appeals in this case (228 N. Y. 309, 316) is that the provision of the act, making the confirmation of the award by the Board of Revision of Assessments final and conclusive, would not prevent "the consideration on certiorari of questions of jurisdiction, fraud and willful misconduct on the part of the officials composing the boards", but that it was conclusive against the right to a general review of questions relating to the subject of damages such as the plaintiff in error was presenting to it. *Matter of Southern Boulevard R. R. Co.*, 143 N. Y. 253, 259, is cited as a precedent for this holding.

Thus the contention of the plaintiff in error, pursued through all the state courts and now presented in this court, is, that the modification by the Act of 1918 of the remedy available to her intestate when the viaduct was constructed and his right to damages became complete, offends: (1) Against the contract impairment clause (Art. I, § 10); (2) against the equal protection clause; and (3) against the due process of law clause of the Fourteenth Amendment to the Federal Constitution.

As to the first of these contentions.

While, under the holdings in *People ex rel. Crane* v. *Ormond*, 221 N. Y. 283, and *Ettor* v. *City of Tacoma*, 228 U. S. 148, the decedent of the plaintiff in error had a vested property right to compensation after the completion of the viaduct, very clearly this was not a contract right in a constitutional sense.

It has long been settled by decisions of this court that the word "contracts" in § 10 of Article I of the Constitution is used in its usual or popular sense as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. "Mutual assent" [express or implied] "to its terms is of its very essence." *State of Louisiana ex rel. Folsom* v. *Mayor and Administrators of New Orleans,* 109 U. S. 285, 288; *Freeland* v. *Williams,* 131 U. S. 405, 414; *Essex Public Road Board* v. *Skinkle,* 140 U. S. 334, 340; *Morley* v. *Lake Shore & Michigan Southern Ry. Co.,* 146 U. S. 162, 169; *Garrison* v. *City of New York,* 21 Wall. 196, 203.

The Court of Appeals held that at common law the intestate of the plaintiff in error did not have any right of action for the damage done to his property (*Sauer* v. *City of New York,* 180 N. Y. 27), and this court affirmed that judgment in 206 U. S. 536, *supra.* In the later case, 221 N. Y. 283, *supra,* by treating the construction of the viaduct as a change of grade of the street, a statute (not noticed in the earlier decision) was made applicable and from it was derived the right to recover asserted in this case. The origin of the right is thus wholly statutory, an act of grace by the legislature, as if "consulting the interests of morality," so that there is nothing in the nature of a contract in it, and therefore there is nothing in the case for the contract impairment clause of the Constitution to operate upon. The first contention of the plaintiff in error cannot be sustained.

The statement of the case shows that, stripped of nonessentials, the second contention of the plaintiff in error is that the cutting down by the amendment of 1918 of her remedy from a general review in the State Supreme Court to a review limited to "questions of jurisdiction, fraud and willful misconduct on the part of the officials composing the boards," deprived her of her property without due process of law.

In determining whether or not due process of law has been denied regard must always be had to the character of the proceeding involved for the purpose of determining what the practice at common law was and what the practice in this country has been in like cases. *Twining* v. *New Jersey*, 211 U. S. 78, 100.

The right of the plaintiff in error to damages having been established by the decision in 221 N. Y. 283, *supra*, there remained only the problem of determining the amount of the award which should be made and the manner of making it, and the reference of such a question, especially in eminent domain proceedings, to a commission, or board, or sheriff's jury, or other non-judicial tribunal, was so common in England and in this country prior to the adoption of the Federal Constitution that it has been held repeatedly that it is a form of procedure within the power of the State to provide and that when opportunity to be heard is given it satisfies the requirements of due process of law, especially when, as in this case, a right of review in the courts is given. *Custiss* v. *Georgetown & Alexandria Turnpike Co.*, 6 Cranch, 233; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 569; *United States* v. *Jones*, 109 U. S. 513, 519; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 688; and *Bauman* v. *Ross*, 167 U. S. 548, 593.

No one has a vested right in any given mode of procedure (*Railroad Co.* v. *Grant*, 98 U. S. 398, 401; *Gwin* v. *United States*, 184 U. S. 669, 674) and so long as a substantial and efficient remedy remains or is provided due process of law is not denied by a legislative change. *Oshkosh Waterworks Co.* v. *Oshkosh*, 187 U. S. 437, 439.

The amendment of 1918, following an earlier amendment in 1901, gave to the plaintiff in error the right to have the award of the Board of Assessors reviewed by the Board of Revision of Assessments, which her intestate did not have when the viaduct was constructed, and while the

amendment of 1918 made the finding of the latter conclusive as to the "amount of damage sustained," it retained the right to review in the courts the entire finding, whenever lack of jurisdiction, or fraud, or wilful misconduct on the part of the members of the Board should be asserted. This afforded ample protection for the fundamental rights of the plaintiff in error, and the taking away of the right to have examined mere claims of honest error in the conduct of the proceeding by the Board did not invade any federal constitutional right. Even courts have been known to make rulings thought by counsel to be erroneous. *McGovern* v. *City of New York*, 229 U. S. 363.

The Court of Appeals declares that the theory of the amendment is well understood to be "the policy that the greater good is sometimes served by making certain classes of decisions final and ending litigation, even though in a particular case the individual is prevented by review from correcting some error which has injured him."

It may not be an undiluted evil to the real parties in interest to this litigation, which has been pending in various forms for nearly thirty years, to have it brought to an end and to have the large award allowed in 1918 divided among them.

Plainly this second claim of the plaintiff in error must be denied.

The final contention is that the amendment of 1918 to the act denies to the plaintiff in error the equal protection of the laws.

It is argued, far from confidently, that this invasion of constitutional right arises from the fact that the Board of Revision of Assessments, having final jurisdiction over the amount of the damages suffered by the intestate of the plaintiff in error, is composed of three city officials, appointed by the mayor, with power to pass on claims against it and that this denies to her an impartial tribunal. This membership of the Board had existed since 1901.

142. Counsel for Parties.

The disposition of this contention by the Court of Appeals is quite sufficient, saying:

"The officials who heard her claim were not disqualified because selected by the city. Her claim was not against the city but if allowed was collected by assessment. Officials acting really as an auditing board are not condemned because they have been selected by the municipality or other division against which the claim is made. If it were otherwise a great many bodies passing in a judicial capacity on claims from the Board of Claims down, would be disqualified."

The judgment of the Supreme Court, Appellate Division, First Judicial Department of the State of New York, entered on remittitur from the Court of Appeals is

Affirmed.